CC 1.12/3: 10/3

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Federal Communications Commission Record

Volume 10
Issue 3

Table of Contents

Table of Cases..... i

Table of FCC and Delegated Authority Numbers..... iii

Table of Docket Numbers..... iv

Table of Rulemakings..... v

Table of Localities..... vi

Table by Subject Matter..... vii

Table by Statutory and Rule Provisions..... ix

Decisions, Reports, Memorandum Opinions, Orders, and Other Selected Material..... 865

Case Name	Page
Lightning Broadcasting Company	948
Lowell Cable Television Department	1023
MCI Communications Corporation	1072
MCI Telecommunications Corporation	951
Mercom, Inc.	1071
Metropolitan Communications Corp. et al.	1209
Multipoint Distribution Service Stations	1335
Naleszkiewicz, Nancy	1083
Nashoba Cable Services	994
National Exchange Carrier Association, Inc.	1047
New England Cablevision of Massachusetts, Inc.	908
NewChannels Corporation	913
Paging Network of Virginia, Inc.	1016
PanAmSat Carrier Services, Inc.	928
Pikes Peak Broadcasting Company	1050
Pray, Inc.	1053
Public Safety Meeting for Washington, DC Metropolitan Area	1213
Public Safety Region 8 Applications	1220
Public Safety Region 9 Applications	1216
Public Switched Network - Priority Calls	1208
Radiotelegraph Operator Certificate Examinations	1217
Ramon Rodriguez and Associates, Inc.	971
Request for Waiver to Use Frequencies in the 482-488 MHz Band	923
Requests for Waiver of Section 90.603(c) - Wireline Common Carriers	1214
Schoenbohm, Herbert L.	970
TCI Cablevision of Central Indiana, Inc.	903
TCI Cablevision of Colorado, Inc.	905
TCI Cablevision of North Central Kentucky, Inc.	926
TCI Cablevision of West Michigan, Inc.	1066
TV-24 Sarasota, Inc.	991
Table of Allotments, FM, Cambria, CA	869
Table of Allotments, FM, Charlotte Amalie, VI	865
Table of Allotments, FM, Coleman, Sebewaing and Tuscola, MI	873
Table of Allotments, FM, Cushing and Cleveland, TX	968
Table of Allotments, FM, Hudson, TX	955
Table of Allotments, FM, Leavenworth and Othello, WA	983
Table of Allotments, FM, Pago Pago, American Samoa	981
Table of Allotments, FM, Sun Valley, NV	871
Table of Allotments, FM, Tompkinsville, KY	867
Table of Allotments, FM, Tower Hill, IL	952
Table of Allotments, FM, Various Locations	954
Tele-Media Company of North Carolina	882
Telecommunications Relay Services and Americans with Disabilities	1191
Telemundo Group, Inc.	1104
Telenois, Inc.	911
Time Warner Cable	936
Time Warner Cable	962
Time Warner Cable	1059
Twin County Cable	892
Valley Center Cablesystems, L.P.	884
Viacom Cable	986
White, John H.	1100
Willow Park Cable TV	888
Wolfe Communications, Inc.	957
Wolfe Communications, Inc.	966

Table of Cases by Delegated Authority and FCC Number

Volume 10
Issue 3

Delegated Authority or FCC Number	Page
DA 94 - 31	1208
DA 94 - 305	1209
DA 94 - 327	1211
DA 94 - 329	1214
DA 94 - 748	1216
DA 94 - 838	1217
DA 94 - 876	1218
DA 94 - 978	1213
DA 94 -1017	1220
DA 94 -1023	1221
DA 94 -1187	1223
DA 94 -1406	898
DA 94 -1459	923
DA 94 -1474	922
DA 94 -1479	926
DA 94 -1486	899
DA 94 -1487	1110
DA 94 -1500	900
DA 94 -1503	924
DA 94 -1506	925
DA 94 -1524	1069
DA 94 -1532	878
DA 94 -1536	880
DA 94 -1537	882
DA 94 -1538	884
DA 94 -1539	886
DA 94 -1540	888
DA 94 -1541	890
DA 94 -1542	892
DA 94 -1544	1071
DA 94 -1547	994
DA 94 -1548	998
DA 94 -1551	1002
DA 94 -1553	1006
DA 94 -1555	1011
DA 94 -1561	894
DA 94 -1564	991
DA 94 -1568	896
DA 94 -1580	902
DA 94 -1591	1015
DA 94 -1601	988
DA 94 -1603	1072
DA 94 -1604	903
DA 94 -1606	905
DA 94 -1607	908
DA 94 -1608	911
DA 94 -1609	913
DA 94 -1610	1191
DA 94 -1628	1059
DA 94 -1631	986
DA 94 -1632	1066
DA 94 -1636	1044
DA 94 -1640	928
DA 95 - 1	1023
DA 95 - 4	1025
DA 95 - 5	1028
DA 95 - 6	1031
DA 95 - 7	1033
DA 95 - 8	1036
DA 95 - 21	1016
DA 95 - 31	1061
DA 95 - 32	865
DA 95 - 33	867
DA 95 - 39	869
DA 95 - 40	871
DA 95 - 46	873
DA 95 - 47	932
DA 95 - 49	951
DA 95 - 55	935
DA 95 - 62	948
DA 95 - 63	944
DA 95 - 64	957
DA 95 - 65	936
DA 95 - 69	940
DA 95 - 70	943
DA 95 - 71	958
DA 95 - 72	952
DA 95 - 73	954
DA 95 - 74	955
DA 95 - 77	1048
DA 95 - 78	1050
DA 95 - 79	1051
DA 95 - 80	960
DA 95 - 81	966
DA 95 - 82	962
DA 95 - 83	970
DA 95 - 86	977
DA 95 - 93	968
DA 95 - 103	1053
DA 95 - 104	1055
DA 95 - 107	983
DA 95 - 108	981
DA 95 - 114	1047
DA 95 - 118	1058
FCC 94 - 286	1226
FCC 94 - 290	1335
FCC 94 - 317	919
FCC 94 - 318	1101
FCC 94 - 327	915
FCC 94 - 341	1104
FCC 94 - 343	1039
FCC 94 - 344	876
FCC 95 - 9	1225
FCC 95 - 10	1080
FCC 95 - 11	1100
FCC 95 - 25	971
FCC 95 - 33	1083

Table of Cases by Docket Number
Volume 10
Issue 3

Docket Number			Page
CC	Dkt.No.90 -	571	1191
CC	Dkt.No.90 -	591	1083
CC	Dkt.No.94 -	139	899
ET	Dkt.No.94 -	32	1015
MM	Dkt.No.91 -	172	968
MM	Dkt.No.92 -	266	1226
MM	Dkt.No.93 -	215	1226
MM	Dkt.No.95 -	4	865
MM	Dkt.No.95 -	7	873
MM	Dkt.No.95 -	8	867
MM	Dkt.No.95 -	9	869
MM	Dkt.No.95 -	10	871
MM	Dkt.No.95 -	12	955
MM	Dkt.No.95 -	13	952
MM	Dkt.No.95 -	14	983
MM	Dkt.No.95 -	15	981
PR	Dkt.No.93 -	85	876
PR	Dkt.No.93 -	305	1039
WT	Dkt.No.95 -	11	970

Table of Cases by Rulemaking Number

Volume 10
Issue 3

Rulemaking Number	Page
RM - 7649	876
RM - 7669	876
RM - 7675	876
RM - 7676	876
RM - 7681	876
RM - 7726	968
RM - 7800	968
RM - 7801	968
RM - 7904	876
RM - 8501	865
RM - 8552	983
RM - 8559	955
RM - 8560	869
RM - 8561	873
RM - 8563	867
RM - 8566	952
RM - 8572	871
RM - 8574	981

Table of Cases by City
Volume 10
Issue 3

City/ State	Page
Alamance County, NC	882
Albany, NY	936
Algoma Township, MI	1025
Alpine, MI	1031
Anderson, IN	903
Anderson, CA	986
Bartholomew, IN	988
Beverly Hills, CA	1006
Binghamton, NY	1011
Boulder, CO	905
Cambria, CA	869
Charlotte Amalie, VI	865
Chicago, IL	1080
City of Bubleson, TX	888
City of Maitland, FL	1059
Cleveland, TX	968
Coleman, MI	873
Cushing, TX	968
Danvers, MA	994
East Wenatchee, WA	983
Fresno, CA	958
Grass Lake Township, MI	890
Greensboro, NC	915
Hanford, CA	958
Hudson, TX	955
Kingshill, VI	970
La Crosse, WI	1100
Lajas, PR	971
Leavenworth, WA	983
Los Angeles, CA	1006
Mt. Washington, KY	926
Orlando, FL	940
Othello, WA	983
Redding, CA	986
Reynolds Township, MI	886
Richmond, MI	1033
Salt Lake County, UT	1069
San Diego County, CA	884
Santa Fe, NM	919
Sebewaing, MI	873
Southern Shores, NC	1002
Sun Valley, NV	871
Syracuse, NY	913
Tompkinsville, KY	867
Tower Hill, IL	952
Township of Salisbur, PA	892
Tuscola, MI	873
Vergennes, MI	1066
Vergennes Township, MI	1023
Village of Glenview, IL	911
Visabia, CA	958
Washington, DC	922
Washington, DC	1071
Wayland Township, MI	1036
Winter Springs, FL	1059

Subject	Page
Amateur Radio Service (ARS)	
ARS - Licenses, examinations for operators'	
ARS - Transmissions and practices, prohibited	
Broadcasting and related activities prohibited	876
Broadcast Radio Services - General Rules	
Licenses and permits	
Multiple ownership of broadcast stations in the same service	1104
Broadcasting - FM Stations	
Allotments and assignments	
Allotments, table of	869, 871, 873, 865, 954, 952, 955, 968, 981, 867
Cable Television Service	
Markets and services	
Cable signals in major markets, provisions	936, 944, 948, 958, 960, 1048, 1051
Cable signals in sites outside major and smaller markets	944
Cable signals in smaller markets,provisions	936, 966, 962
Carriers: Service Altered	
Extensions and supplements	
Applications, contents of	928, 932, 1044
Commission Organization	
Delegations of authority - Chief, Common Carrier Bureau	
Limitations on delegated authority	925, 943
Common Carriers: Miscellaneous Rules	
Enforcement of .602 and .603 delegated to state public utility	1191
Hearing aid compatible telephones by exchange carriers	1191
Hearing/speech/vision/mobility, equipment and services	1191
TDD users, notification of termination of assistance to	1191
Communications Act of 1934	
Common Carriers	
Complaints to the commission	943
Extension of lines, certificate for	1110, 928, 932, 1044
Interlocking directorates	1110
Radio, provisions for	
Candidates for public office, facilities for	940
Radio, provisions relating to	
Licenses, limitation on holding and transfer of	1110
Practice and Procedure	
Information, general	
Rules, suspension, amendment, waiver	894
Pleadings, briefs	
Pleadings and filing periods, provisions regarding	894
Reconsideration/review of Commission action	

Subject				Page
Reconsideration of a final FCC action, pet.	1069,	880,	882,	890 892

TABLE OF STATUTORY AND RULE PROVISIONS

	Page
000.291 Delegated Authority	898
000.291 Delegated Authority	899
001.106 Petitions for Reconsideration	880
001.106 Petitions for reconsideration	882
001.106 Petitions for Reconsideration	890
001.106 Petitions for Reconsideration	892
001.106 Petitions for Reconsideration	1069
001.1107 Payment of charge	1100
001.1110 Conditionality of Commission on staff authorzations	1100
001.115 Application for Review FCC 95-10 1/24/95	1080
001.800 Forfeiture proceedings.	915
017.210 Painting and lighting, when required.	915
017.700 Antenna structures requiring notification to the FAA	915
022.117 Transmitters.	915
024.430 Oppositions to Applications	1016
063.001 Contents of Applications	928
063.001 Contents of Applications	932
063.001 Contents of Applications	1044
064.1001 International Settlements Policy & Waivers	932
064.601-605 Telecommunications Relay Services	1118
073.1216 Licensee-conducted contests	1080
073.1942 Candidate Rates	940
073.202 FM Table of Allotments	869
073.202 FM Table of Allotments	873
073.202 FM Table of Allotments	952
073.202 FM Table of Allotments	954
073.202 FM Table of Allotments	968
073.3555 - Multiple Ownership	1104
074.913 Selection Procedure for mutually exclusive ITFS applica	919
074.931 Purpose and permissible service	919
074.932 Eligibility and licensing requirements	919
076.309(c)(3)(i)(B) Customer service obligations.	922
076.560 Signal carriage obligations	1053
076.570 Channel Positioning	944
076.580 Notification	1053
076.59 Modification of television markets	936
076.590 Modification of television markets	962
076.610 Disputes concerning carriage	944
076.610 Disputes concerning carriage	948
076.610 Disputes Concerning Carriage	957
076.610 Disputes concerning carriage	958
076.610 Disputes concerning carriage	960
076.610 Disputes concerning carriage	962
076.610 Disputes concerning carriage	966
076.610 Disputes concerning carriage	977
076.610 Disputes concerning carriage	1048
076.610 Disputes concerning carriage	1050
076.610 Disputes concerning carriage	1051
076.610(b) Complaints regarding qualified NCE stations	1055
076.905 Standards for Effective Competition	884

076.905 Standards for Effective Competition 886
076.905 Standards for Effective Competition 888
076.905 Standards for Effective Competition 988
076.905 Standards for Effective Competition 1023
076.905 Standards for Effective Competition 1025
076.905 Standards for Effective Competition 1028
076.905 Standards for Effective Competition 1031
076.905 Standards for Effective Competition 1033
076.905 Standards for Effective Competition 1036
076.905 Standards of Effective Competition 882
076.906 Presumption of no effective competion 880
076.906 Presumption of no effective competion 882
076.906 Presumption of no effective competion 890
076.906 Presumption of No Effective Competition 884
076.906 Presumption of No Effective Competition 886
076.906 Presumption of No Effective Competition 888
076.906 Presumption of no effective competition 892
076.906 Presumption of No Effective Competition 988
076.906 Presumption of No Effective Competition 1023
076.906 Presumption of No Effective Competition 1025
076.906 Presumption of No Effective Competition 1028
076.906 Presumption of No Effective Competition 1031
076.906 Presumption of No Effective Competition 1033
076.906 Presumption of No Effective Competition 1036
076.906 Presumption of no effective competition 1069
076.910 Franchising authority certification 880
076.910 Franchising authority certification 882
076.910 Franchising Authority Certification 884
076.910 Franchising Authority Certification 886
076.910 Franchising Authority Certification 888
076.910 Franchising authority certification 890
076.910 Franchising authority certification 892
076.910 Franchising Authority Certification 988
076.910 Franchising Authority Certification 1023
076.910 Franchising Authority Certification 1025
076.910 Franchising Authority Certification 1028
076.910 Franchising Authority Certification 1031
076.910 Franchising Authority Certification 1033
076.910 Franchising Authority Certification 1036
076.910 Franchising authority certification 1069
076.911 Petition for Reconsideration 884
076.911 Petition for Reconsideration 886
076.911 Petition for Reconsideration 888
076.911 Petition for Reconsideration 988
076.911 Petition for Reconsideration 1023
076.911 Petition for Reconsideration 1025
076.911 Petition for Reconsideration 1028
076.911 Petition for Reconsideration 1031
076.911 Petition for Reconsideration 1033
076.911 Petition for Reconsideration 1036
076.911 Petition for reconsideration of certification 880
076.911 Petition for reconsideration of certification 882
076.911 Petition for reconsideration of certification 890
076.911 Petition for reconsideration of certification 892

076.911 Petition for reconsideration of certification 1069
076.914 Revocation of Certification 884
076.914 Revocation of Certification 886
076.914 Revocation of Certification 888
076.922 Basic Tier Rates 903
076.922 Basic Tier Rates 905
076.922 Basic Tier Rates 908
076.922 Basic Tier Rates 911
076.922 Basic Tier Rates 926
076.922 Rates for Cable Programming Service tier 1059
076.922 Rates for Cable Programming Service tier 1066
076.922 Rates for Cable Programming Service tiers 986
076.922 Rates for Cable Programming Servie tiers 994
076.922 Rates for Cable Programming Servie tiers 998
076.922 Rates for Cable Programming Servie tiers 1002
076.922 Rates for Cable Programming Servie tiers 1006
076.922 Rates for Cable Programming Servie tiers 1011
076.922 Rates for Cable Programming Servie tiers 1071
076.922 Rates for the basic service tier and cable programming services tier 913
076.942 Refunds 903
076.942 Refunds 905
076.942 Refunds 908
076.942 Refunds 911
076.942 Refunds 926
076.944 Commission Review of Franchising Authority Rate Decision 903
076.944 Commission Review of Franchising Authority Rate Decision 905
076.944 Commission Review of Franchising Authority Rate Decision 908
076.944 Commission Review of Franchising Authority Rate Decision 911
076.944 Commission Review of Franchising Authority Rate Decision 926
076.964 Advance written notification of rate increases. 922
076.970 Commercial leased access rates 991
097.113 Prohibited transmissions 876
097.190 Application for a vanity call sign 1039
300.208 Complaints to the Commission 943
300.212, Interlocking Directorates 1110
300.214 Extension of Lines 928
300.214 Extension of Lines 932
300.214 Extension of Lines 1044
300.214 Extension of Lines 1110
300.225 Telecommunications Relay Services 1118
300.309(j)(13) Recovery of Value of Public Spectrum in 1101
300.310 Limitation on Holding and Transfer of Licenses 1110
300.315 Candidates for Public Office 940
300.534 Carriage of local commercial television signals 936
300.534 Carriage of Local Commercial Television Signals 957
300.534 Carriage of local commercial television signals 958
300.534 Carriage of local commercial television signals 960
300.534 Carriage of Local Commercial Television Signals 962
300.534 Carriage of local commercial television signals 966
300.534 Carriage of local commercial television signals 1048
300.534 Carriage of local commercial television signals 1050
300.534 Carriage of local commercial television signals 1051
300.534 Channel positioning rights of local commercial television signals 944
300.534 Signal carriage rights of LPTV stations 948

300.535 Carriage of noncommercial educational television 1055
300.543 Carriage of local commercial television signals 977
300.623 Regulation of Rates 880
300.623 Regulation of rates 882
300.623 Regulation of Rates 890
300.623 Regulation of Rates 892
300.623 Regulation of Rates 1069
500.260, HDO,Schoenbohm,Kingshill,Virgin Islands 970
500.3002 Abuse of process 971
500.3034 Character qualifications 1083
500.3063 Evidence 971
500.3063 Evidence 1083
500.3092 Law, violation of 1083
500.3105 Misrepresentation and lack of candor 971
500.3105 Misrepresentation and lack of candor 1083
600.623 Regulation of Rates 884
600.623 Regulation of Rates 886
600.623 Regulation of Rates 888
600.623 Regulation of Rates 988
600.623 Regulation of Rates 1023
600.623 Regulation of Rates 1025
600.623 Regulation of Rates 1028
600.623 Regulation of Rates 1031
600.623 Regulation of Rates 1033
600.623 Regulation of Rates 1036

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-4

In the Matter of

Amendment of Section 73.202(b) RM-8501
Table of Allotments,
FM Broadcast Stations.
(Charlotte Amalie, Virgin Islands)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 6, 1995; Released: January 23, 1995

Comment Date: March 16, 1995
Reply Comment Date: March 31, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Virgin Islands Public Television System ("petitioner"), proposing the allotment of Channel 226A at Charlotte Amalie, Virgin Islands, and its reservation for noncommercial educational use. Petitioner states its intention to apply for the channel, if allotted.

2. In support of its proposal, petitioner states that the U.S. Virgin Islands is an English-speaking United States territory located approximately 1,000 miles southeast of Miami, Florida. The three major islands are St. Thomas, St. Croix and St. John, with a total population of 101,809. St. Thomas is located approximately 40 miles east of Puerto Rico, with St. John a few miles east of St. Thomas. St. Croix is located approximately 40 miles south of St. Thomas. Petitioner also states it has applications pending to construct public radio stations at Christiansted, St. Croix (File No. BPED-930114MB) and Charlotte Amalie, St. Thomas (File No. BPED-930114MK), both of which have been opposed by the Puerto Rico Public Broadcasting Corporation ("PRPBC").[1] Petitioner asserts that the proposed radio facilities at St. Croix and St. Thomas in the noncommercial educational band would cause potential Channel 6 television interference. Petitioner further asserts that the potential interference can be avoided by modifying its St. Croix application, but that no modification is feasible for the St. Thomas application because of its proximity to Puerto Rico. Therefore, petitioner urges that since there are no Class A channels available in the noncommercial educational band, that Channel 226A be allotted at Charlotte Amalie and reserved for noncommercial educational use as the community's first public radio service.

3. Generally, noncommercial educational stations operate within the reserved portion of the FM band (Channels 201-220). However, exceptions have been made where channels in the noncommercial educational band are not available because of foreign allotments or potential interference to operation on VHF Television Channel 6. Here, potential interference to Station WIPR-TV, Channel 6, San Juan, Puerto Rico, appears to justify the reservation of a channel in the nonreserved band (Channels 221-300) for noncommercial educational use. An engineering analysis has confirmed that there are no Class A channels available in the noncommercial educational band. Therefore, the allotment and reservation of a commercial channel appears to be the only way to provide a full Class A noncommercial educational channel to Charlotte Amalie.

4. We believe the public interest would be served by proposing the allotment of Channel 226A at Charlotte Amalie and to reserve the channel for noncommercial educational use, since it would provide the community with an educational service. An engineering analysis has determined that Channel 226A can be allotted to Charlotte Amalie in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction at petitioner's requested site.[2]

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Charlotte Amalie, Virgin Islands	241B1, 246B, 250B, 271B, 282B, 287B	*226A, 241B1, 246B, 250B, 271B, *275A,[3] 282B

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **March 16, 1995** and reply comments on or before **March 31, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

---

[1] PRPBC alleges that operation of the radio stations would interfere with reception of the signal of noncommercial educational Station WIPR-TV Channel 6, San Juan, Puerto Rico, in violation of Section 73.525 of the Commission's Rules. In addition, petitioner notes that the application for St. Thomas is mutually exclusive with the application of Clamor Broadcasting Network, Inc., for authority to construct a new noncommercial educational station at Culebra, Puerto Rico (File No. BPED-930503MD).

[2] The coordinates for Channel 226A Charlotte Amalie are North Latitude 18-21-26 and West Longitude 65-56-50.

[3] We note that a petition was filed by Virgin Islands Youth Development Radio, Inc. requesting the allotment of Channel 275A at Charlotte Amalie and its reservation for noncommercial educational use. A Notice of Proposed Rule Making is issued concurrently to cover this proceeding (RM-8502).

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1350 Connecticut Ave., N.W.
Washington, D.C. 20036-1702
(Counsel for Petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required*. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures*. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service*. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies*. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings*. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-8

In the Matter of

Amendment of Section 73.202(b) RM-8563
Table of Allotments,
FM Broadcast Stations.
(Tompkinsville, Kentucky)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 11, 1995; Released: January 23, 1995

Comment Date: March 16, 1995
Reply Comment Date: March 31, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Falcon Broadcasters ("petitioner") requesting the allotment of Channel 274A at Tompkinsville, Kentucky, as the community's second local FM transmission service. Petitioner states its intention to apply for the channel, if allotted.

2. We believe the proposal warrants consideration since it could provide the community with its second local FM transmission service. An engineering analysis has determined that Channel 274A can be allotted to Tompkinsville, Kentucky, in compliance with the Commission's minimum distance separation requirements with a site restriction of 9.5 kilometers (5.9 miles) southeast to avoid short-spacings to vacant Channel 273C3, Crossville, Tennessee, Station WYCQ(FM), Channel 275C1, Shelbyville, Tennessee, and Station WTKY(FM), Channel 221A, Tompkinsville, Kentucky.[1]

3. Accordingly, we will seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Tompkinsville, Kentucky	221A	221A, 274A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 16, 1995**, and reply comments on or before **March 31, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Bradford D. Carey, Esq.
Hardy & Carey, L.L.P.
111 Veterans Memorial Blvd.
Suite 255
Metairie, Louisiana 70005
(Counsel for Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 274A at Tompkinsville are North Latitude 36-39-55 and West Longitude 85-35-51.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-9

In the Matter of

Amendment of Section 73.202(b), RM-8560
Table of Allotments,
FM Broadcast Stations.
(Cambria, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 11, 1995; Released: January 23, 1995

Comment Date: March 16, 1995
Reply Comment Date: March 31, 1995

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of James Kampschroer ("petitioner") requesting the allotment of Channel 278A to Cambria, California, as that community's second local FM service. Petitioner stated his intention to apply for Channel 278A if it is allotted to Cambria, as requested.

Technical Statement

2. A staff review of the proposal reveals that Channel 278A can be allotted to Cambria, California, in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, without the imposition of a site restriction, at coordinates North Latitude 35-33-54 and West Longitude 121-04-48.

3. We believe the public interest would be served by proposing the allotment of Channel 278A to Cambria, California, since an interest has been expressed in providing a second local FM service to that community. Therefore, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Cambria, California, as follows:

	Channel No.	
City	Present	Proposed
Cambria, California	235B1	235B1, 278A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 16, 1995**, and reply comments on or before **March 31, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Margaret L. Tobey, Esq.
Akin, Gump, Strauss, Hauer & Feld
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-10

In the Matter of

Amendment of Section 73.202(b),	RM-8572
Table of Allotments,	
FM Broadcast Stations.	
(Sun Valley, Nevada)	

NOTICE OF PROPOSED RULE MAKING

Adopted: January 11, 1995; Released: January 23, 1995

Comment Date: March 16, 1995
Reply Comment Date: March 31, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by James D. Sleeman ("petitioner") requesting the allotment of Channel 229A to Sun Valley, Nevada, as that community's first local FM service.[1] Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 229A to Sun Valley since it could provide the community with its first local FM broadcast service. Channel 229A can be allotted to the community in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Sun Valley, Nevada	--	229A, 233C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 16, 1995**, and reply comments on or before **March 31, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

James D. Sleeman
125 Chester Avenue
Annapolis, MD 21403
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2189. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO

[1] We note that the Commission also has pending before it the proposal of Sapphire Broadcasting, Inc. to allot Channel 233C2 to Sun Valley. *See* MM Docket No. 90-189, 5 FCC Rcd 2137 (1990).

[2] The coordinates for Channel 229A at Sun Valley is 39-35-47 North Latitude and 119-46-30 West Longitude.

AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-7

In the Matter of

Amendment of Section 73.202(b), RM-8561
Table of Allotments,
FM Broadcast Stations.
(Coleman, Sebewaing and
Tuscola, Michigan)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: January 12, 1995; Released: January 23, 1995

Comment Date: March 16, 1995
Reply Comment Date: March 31, 1995

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Faircom Flint, Inc. ("petitioner"), requesting the substitution of Channel 268A for Channel 269A at Tuscola, Michigan, and modification of the license for Station WBBN to specify operation on Channel 268A. Petitioner also requests substitution of Channel 269A for Channel 268A, Coleman, Michigan, and substitution of Channel 281A for vacant Channel 267A at Sebewaing, Michigan. Petitioner provided an engineering study in support of the proposal and indicated it would apply for the channel at Tuscola.

2. In support of its proposal, petitioner states that Station WBBN, Tuscola and Station WPRJ, Coleman, are currently restricted to operating with three kilowatts. Further, Station WBBN, operating on Channel 269A at Tuscola, receives interference in its normal service area from Station WILS-FM, Flint, Michigan, and Station WDET, Detroit, Michigan. According to petitioner, that by exchanging the channel allotments at Tuscola and Coleman, both stations will be able to operate with six kilowatts. However, the vacant allotment at Sebewaing will need to be changed, to accommodate these substitutions. Petitioner points out that in this case, improvements must be afforded to both Stations WBBN and WPRJ or there can be no improvements at all as this exchange of channels at Tuscola and Coleman would appear to qualify as an incompatible channel swap.[1]

3. Whenever an existing licensee is ordered to switch frequencies in order to accommodate a new channel allotment, we require the proponent of a new allotment to make a commitment that it will reimburse the affected station(s) for costs incurred in changing frequencies. Petitioner has acknowledged its responsibility to reimburse Station WPRJ, Coleman, Michigan, for the reasonable costs in changing frequency if the substitution at Tuscola is granted.

4. We believe petitioner's proposal warrants consideration because the proposed substitutions will provide expanded reception service to Tuscola and Coleman. Channel 268A can be allotted to Tuscola, Michigan, in compliance with the Commission's spacing requirements at a site 10.4 kilometers (6.5 miles) southwest of the community.[2] We shall propose to modify the license for Station WBBN, Channel 269A, to specify operation on Channel 268A in accordance with Section 1.420(g) of the Commission's Rules. Channel 269A can be allotted to Coleman, Michigan, in compliance with the Commission's spacing requirements at a site 11.3 kilometers (7 miles) northeast of the community.[3] To accommodate the substitution at Tuscola and Coleman, we shall also propose to substitute Channel 281A for vacant Channel 267A at Sebewaing, Michigan. The allotment of Channel 281A can be made at Sebewaing at a site 10.1 kilometers (6.3 miles) southwest of the community.[4] Since the communities of Tuscola, Coleman and Sebewaing are located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government will be requested for these allotments. We will request concurrence for the allotment of Channel 268A at Tuscola as a specially negotiated short-spaced allotment as our study indicates that the allotment is short-spaced to Channel 268A, Sarnia, Ontario, Canada.

5. We shall also seek comments as to whether we should delete Channel 267A at Sebewaing, Michigan, to accommodate the substitutions at Tuscola and Coleman. Originally, Channel 280A was allotted to Sebewaing in MM Docket No.81-854, 47 FR 43697, October 4, 1982. Channel 267A was substituted for Channel 280A in MM Docket 89-38. *See* 4 FCC Rcd 8012 (1989). Although Family Stations, Inc. did have a construction permit for Station WWMI, Channel 267A, Sebewaing, the construction permit was forfeited and the call sign deleted on July 3, 1989. Since the construction permit was forfeited, the channel is considered vacant. If, however, comments are filed during the comment cycle in this proceeding stating an intention to file an application for the channel, upon termination of this proceeding, a filing window will be opened for Channel 281A at Sebewaing. It is Commission policy not to delete a channel in which an interest has been expressed. If no interest is expressed in retaining a channel in the community, we shall delete the channel at Sebewaing.

6. In view of the foregoing, we propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

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[1] *See Blair Nebraska, et al*, 8 FCC Rcd 4086 (1993).

[2] The coordinates for Channel 268A at Tuscola are 43-16-02 and 83-45-34.

[3] The coordinates for Channel 269A at Coleman are 43-48-41 and 84-27-57.

[4] The coordinates for Channel 281A at Sebewaing are 43-39-30 and 83-31-00.

OPTION I

City	Channel No. Present	Proposed
Coleman, Michigan	268A	269A
Sebewaing, Michigan	267A	281A
Tuscola, Michigan	269A	268A

OPTION II

Coleman, Michigan	268A	269A
Sebewaing, Michigan	267A	---
Tuscola, Michigan	269A	268A

7. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Come Together Ministries, Inc., the licensee of Station WPRJ, Coleman, Michigan, SHALL SHOW CAUSE why the license should not be modified to specify operation on Channel 269A in lieu of Channel 268A.

8. Pursuant to Section 1.87 of the Commission's Rules, Come Together Ministries, Inc., may not later than **March 16, 1995**, file a written statement showing with particularity why the authorization should not be modified as proposed in the *Order to Show Cause*. The Commission may call upon Come Together Ministries, Inc. to furnish additional information. If Come Together Ministries, Inc. raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement if filed by the date referred to above, Come Together Ministries, Inc. will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

9. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send by Certified Mail, Return Receipt Requested, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to the following:

Come Together Ministries, Inc.

5444 N. Coleman Road

Coleman, Michigan 48618

10. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

11. Interested parties may file comments on or before **March 16, 1995**, and reply comments on or before **March 31, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Richard M. Riehl, Esq.

Haley, Bader & Potts

4350 North Fairfax Drive, Suite 900

Arlington, Virginia 22203-1633

12. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

13. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of

the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 93-85

In the Matter of

Amendment of Part 97 of the	RM-7649 RM-7669
Commission's Rules Concerning	RM-7675 RM-7676
Message Forwarding Systems in	RM-7681 RM-7904
the Amateur Service.	

MEMORANDUM OPINION AND ORDER

Adopted: December 23, 1994; Released: January 23, 1995

By the Commission:

I. INTRODUCTION

1. On March 30, 1994, the Commission adopted a *Report and Order* (*Order*) in this proceeding[1] providing, *inter alia*, that in contemporary message forwarding systems,[2] the control operators of intermediate forwarding stations, *i.e.*, those beyond the first forwarding station, would not be held accountable when their stations inadvertently retransmitted communications not permitted under our rules.[3] The purpose of this *Order* was to relax the amateur service rules to enable these systems to operate at high speed while retaining the minimum safeguards necessary to prevent misuse.[4] Since the adoption of this *Order*, we have received a petition for reconsideration from Mr. Phil Karn. Mr. Karn requests that we reconsider the part of our decision that requires the licensee of the first forwarding station to either authenticate the identity of the station from which it accepts communications on behalf of the system, *or* accept accountability for the content of the message.[5] This *Memorandum Opinion and Order* denies that petition.

II. DISCUSSION

2. The petitioner states that our *Order* is a welcome improvement in the rules.[6] He is concerned, however, that our decision appears to be based on the architecture of the existing packet radio message forwarding network, rather than a principle of broad applicability that will not have to be revisited as amateur service technology and practices evolve. The present system and its architecture, he says, is rapidly being overtaken by new systems that render the concept of a first forwarding station largely meaningless because the originating station and the first forwarding station are the same station in these new systems.[7] Mr. Karn requests, therefore, that we either eliminate all references to first forwarding stations and place all responsibility for violative communications on the originating station, or interpret our *Order* as applying only to certain system architectures.[8]

3. The objective of this proceeding was to ascertain what accommodations, if any, should be provided for amateur stations operated in contemporary high speed message forwarding systems, while retaining safeguards to prevent misuse.[9] One of the accommodations suggested was to place all responsibility for violative messages on the originating station and not hold any control operator of a forwarding station accountable for improper communications.[10] The Commission considered this suggestion, but decided there must be on-going oversight of these systems, and we held the control operators of the first forwarding stations responsible to ensure compliance with our rules.[11] We accepted the recommendation of The American Radio Relay League, Inc., that the control operator of the first forwarding station be required to establish the identity of the originating station, or be held accountable for the message.[12] Mr. Karn's request, therefore, that we place all responsibility on the originating station, was considered and rejected in the *Order*. The petitioner does not present any new information. We continue to believe that peer oversight is reasonable, technologically feasible, and conducive to the overall goal of a self-regulating amateur radio service. Under our rules, the first forwarding station is required either to authenticate the identity of the station from which it accepts a message for further forwarding, or to accept responsibility for the message being permissible under our rules. The originating station must be a different station than the first forwarding station. Any station can be a first forwarding station, including a station functioning as a "digipeater" or as a node. The status of the first forwarding station is determined by the path of the message and is transparent to the configuration of the station or the particular technology being used at the station.

4. The *Order* does not address, nor was it intended to address, all possible message forwarding systems that may be developed in the future. This issue appears to be the main concern of Mr. Karn. If the current rule becomes unworkable in a system using a different architecture, interested parties can request rule changes at the appropriate time.

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[1] 9 FCC Rcd 1786 (1994).

[2] A message forwarding system is a group of amateur stations participating in a voluntary, cooperative, interactive arrangement where messages and other communications from the control operator of an originating station are transmitted to one or more destination stations via forwarding stations, which may or may not be automatically controlled.

[3] Prohibited communications are set forth in Section 97.113 of the Commission's Rules, 47 C.F.R. § 97.113. Although control operators of intermediate forwarding stations other than the first forwarding station no longer have to authenticate the identity of the originating station or screen each message, they do remain responsible for discontinuing improper communications once they become aware of their presence.

[4] *See* Order at 1.

[5] We note that originator authentication techniques in the amateur service are under discussion. See, for example, Jon Bloom, *Empirically Speaking*, QEX ARRL Experimenter's Exchange (November, 1993).

[6] Petition at 1.

[7] *Id.*

[8] *Id.* at 2-3.

[9] *See* Notice of Proposed Rule Making at para. 2.

[10] Order at 4.

[11] *Id.* at 5.

[12] *Id.*

III. ORDERING CLAUSES

5. In view of the foregoing, and pursuant to the authority contained in 47 U.S.C. § 154(i), IT IS ORDERED that the petition for reconsideration of the Commission's decision filed by Mr. Phil Karn IS DENIED.

6. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

7. For further information concerning this *Memorandum Opinion and Order* contact William T. Cross, Wireless Telecommunications Bureau, (202) 418-0680.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cable Operators'
Motions to Dismiss Complaints
Concerning Cable Services Rates

ORDER

Adopted: December 19, 1994; Released: December 21, 1994

By the Chief, Cable Services Bureau:

1. In this Order we grant several motions to dismiss complaints on the grounds that the complaints concern rates that are outside the jurisdiction and authority of this Commission. As explained below, the Commission regulates rates for cable programming services (CPS) only, and then only upon filing of a valid complaint. Our review reveals that the complaints listed at Attachment A below, while asserting that they challenge CPS rates, challenge only rates for basic services, not for CPS. These complaints therefore do not trigger the Commission's jurisdiction, and they are accordingly dismissed.

2. The Cable Television Consumer Protection and Competition Act of 1992 (Cable Act of 1992)[1] distinguishes among basic cable service, premium cable service, and cable programming service:[2] this Commission regulates only cable programming service. The basic service tier includes (at a minimum) the broadcast signals distributed by the cable operator along with any public, educational, and government (PEG) access channels that the local franchise authority requires the cable operator to carry. At the cable operator's discretion, this basic service tier may also include additional program services. Premium cable service consists of channels that are paid for individually (per-channel), such as Home Box Office (HBO) and CineMax. Channels for which the operator charges a per-channel or per-program rate are not subject to regulation. CPS includes all video programming distributed over the system that is not on the basic service tier and for which the operator does not charge on a per channel or per-program basis.[3] This CPS tier is subject to regulation by the Commission in response to a valid complaint. Except in limited circumstances, the Commission does not have jurisdiction over the basic services tier, and cannot act upon complaints concerning rates for that tier. Premium (per-channel) cable service is not subject to rate regulation.

3. The filing of a valid complaint regarding CPS rates establishes our jurisdiction, and triggers the operator's obligation to provide rate justification. The complaints noted here in Attachment A were accepted for filing after preliminary review. Subject operators have subsequently filed motions to dismiss these complaints on the grounds that they concern basic, not CPS, rates. The operators argue that challenges against rates for basic service should be submitted to the appropriate local franchising authority rather than to the Commission.

4. Each of the complaints under consideration here was filed with this Commission on an FCC Form 329. FCC Form 329 is used by subscribers or local franchising authorities wishing to lodge with the Commission a complaint about an operator's CPS rates. The form is entitled "Cable Programming Services Rate Complaint." While it is designed for use in challenging upper tier rates, the form itself does not explain or define basic tier, premium, or cable programming services tier, but simply uses the term 'cable programming services' or 'CPS.' It is thus possible that a complainant might complete such a complaint form, and might check the box which states that "this complaint challenges the operator's CPS rates," without actually having distinguished or understood the difference between basic tier rates, premium service rates, and CPS tier rates.[4]

5. We have examined the complaints listed in Attachment A, and the motions to dismiss filed against them, and we conclude that each challenges only basic rates, not CPS rates. Although in most cases the complainant has checked the box indicating that the rates challenged are CPS rates, and that these rates violate the Commission's rules,[5] the specific information provided by the complainant indicates that only basic rates are actually at issue. When only basic rates are being challenged, the complaint should properly be brought to the attention of the local franchise authority in the first instance, and not filed with this Commission. If one of these complaints does in fact challenge CPS rates, the complainant should file a petition for reconsideration providing information adequate to support its challenge.

6. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B), 47 U.S.C. §543(a)(2)(A) and (B), that the complaints listed in Appendix A hereto ARE DISMISSED.

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[1] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (Cable Act of 1992).

[2] Cable Act of 1992, Section 602, 47 U.S.C. §522.

[3] We need not discuss here those channels which are asserted by the operator to be a la carte, since that distinction is beyond the scope of this Order.

[4] We note that operators have great latitude in determining what channels will be included in the basic tier; once the statutory minimum (broadcast and PEG channels, as discussed above) is met, the operator may include as many additional channels in the basic tier as it wants, or it may move additional channels to a higher tier. Thus it is possible that a complainant might not clearly understand which channels are part of which tier.

[5] The form was changed in December 1993. *See* News Release of December 13, 1993. The change produced a simpler, clearer form, but even the new form does not provide definitions of or distinctions among the various service tiers. The specific assertion that the complainant is challenging CPS rates that violate the Commission's rules is question 13 on the original form; we note that this question has been eliminated on the new form. All the complaints noted here were filed on the original, pre-modification complaint form, and all contain the certification that they challenge CPS rates.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Attachment A

Complaints Dismissed by this Order

CUID No.	Complainant	Cable Operator
AL0255	City of Hokes Bluff	CableSouth, Inc. Birmingham, Alabama
CA0044	Alex Maler	Sonic Cable Television of Santa Cruz Watsonville, California
CA0032	Woody Lynn	
CA0037	Jerald R. Greene	
CA0038	Nancy Morrow	Sonic Cable Television of San Luis Obispo
CA0040	George G. Daniel	San Luis Obispo, California
	Renelle L. Hayes	
CA0778	Edward K. Stackler	
FL0329	James K. Carter and Annette D. Carter	Fairbanks Communications Inc. Delray Beach, Florida
IL1232	William E. Coughlin	Continental Cablevision of Will County, Inc. Romeville, Illinois
MI0672	City of Inkster	Barden Cablevision of Inkster Inkster, Michigan
NJ0330	John J. Tucciarone	TKR Cable Company (Tri-System) Piscataway, New Jersey
NJ0422	New Jersey Board of Regulatory Commissioners	TKR Cable Company of Warwick Warwick, New York
VT0046	Elinor Banquer	First Carolina Cable TV, L.P. Springfield, Vermont

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HORIZON CABLE I
LIMITED PARTNERSHIP

Petition for Reconsideration
of Certification of
Oneida Charter Township, MI
to Regulate Basic Cable Service Rates
(MI1719)

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1994; Released: December 21, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On November 12, 1993, Horizon Cable I Limited Partnership ("Horizon") filed a timely petition for reconsideration challenging the certification of the Oneida Charter Township, MI ("Oneida") to regulate rates for basic cable service and associated equipment.[1] Oneida filed an opposition to which Horizon filed a reply.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[2] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[3] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[4] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[5] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[6]

II. DISCUSSION

3. Horizon argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the households in Oneida, its franchise area.[7] Specifically, Horizon states that it serves 96 of the 1,109 "homes," or nine percent of the total number of "homes," within the franchise area. In support of this claim, Horizon refers to a specific section of the 1990 Census.[8] Finally, Horizon submits a declaration under penalty of perjury from a responsible official certifying the accuracy of the data in the petition.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[9] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within the franchise area.[10] Horizon has failed to meet this burden. Horizon refers to 1990 Census data in its petition; but does not provide a copy of the relevant table or page from the data upon which it is relying. However, it appears that Horizon has inappropriately based its effective competition claim on the number of "housing units" (occupied and vacant) data. Our rules, however, require the use of data reflecting the number of "households" (*i.e.*, occupied housing units) in the franchise area. *See Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*).[11] As Horizon has failed to base its effective competition claim on "household" data as required by our rules, we will deny its petition.[12] Should Horizon wish to submit more specific

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[1] Oneida filed its Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition ("FCC Form 328") on September 23, 1993. Its certification became effective on October 23, 1993.

[2] 47 U.S.C. § 543(a)(4).

[3] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[4] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt or administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[5] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[6] 47 C.F.R. § 76.911(c).

[7] The Commission's rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. The Commission's rules further provide that a cable system is subject to effective competition if fewer than 30 per cent of the households in the system's franchise area subscribe to the system's service. 47 C.F.R. § 76.905(a) and (b)(1).

[8] Horizon refers to Bureau of the Census, U.S. Dept. of Commerce, 1990 CH-1-24, 1990 Census of Housing, General Housing Characteristics, Michigan, Table 1.

[9] 47 C.F.R. § 76.906.

[10] 47 C.F.R. § 76.911(b)(1).

[11] As the Commission stated in the *Third Recon. Order*, "[a]s used in the Cable Act, we presume that Congress did not intend households' to have a different meaning than in the 1990 Census that would include vacant units or even partial year vacant units." *Third Recon. Order*, *supra*. The term "household" is defined for purposes of the 1990 Census data as "all the persons who occupy a housing unit." Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. Thus, the term "households" reflects only occupied housing units. The term "housing units", however, was defined by the Census Bureau to include both occupied and vacant units.

[12] Oneida argues that Horizon is not subject to effective competition because Horizon's cable system passes 150 "homes" in the Township, of which it serves 96. Oneida also states that Continental Cablevision, another cable operator serving Oneida,

information sufficient to demonstrate the presence of effective competition, it may submit such information by filing a petition for revocation pursuant to Section 76.914 of the Commission's rules. 47 C.F.R. § 76.914.

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Horizon Cable I Limited Partnership challenging the certification of the Oneida Charter Township, MI to regulate basic cable rates IS DENIED.

6. IT IS FURTHER ORDERED that the automatic stay imposed by Section 76.911(c) of the Commission's Rules, as amended, 47 C.F.R. § 76.911(c) IS TERMINATED.

7. IT IS FURTHER ORDERED that Horizon Cable I Limited Partnership SHALL FILE the required rate justifications on the applicable forms with the Oneida Chater Township within thirty (30) days of the release date of this *Memorandum Opinion and Order* or within thirty (30) days of receipt of notice from the Oneida Charter Township that it is regulating Horizon's rates, whichever is later.

8. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

passes 452 "homes" of which it serves 326. Oneida also argues that because Horizon has determined to confine its service operations to a restricted section of the township, it should not be allowed to base its effective competition claim on the total number of "homes" in the township. In reply, Horizon denies restricting its service to a smaller portion of Oneida Charter Township. It states that under its franchise agreement with Oneida Charter Township, it is obligated to extend service to all new areas with a density of 40 homes per mile. It states that between 1992 and 1993, it has expanded its existing area of service within Oneida by 30 percent. Horizon states that it plans to further expand the service area in Oneida in the near future. In light of our decision to deny Horizon's claim, it is not necessary to address these arguments.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELE-MEDIA COMPANY OF
NORTH CAROLINA

Petition for Reconsideration
of Certification of Alamance County
to Regulate Basic Cable Service Rates
(NC0386)

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1994; Released: December 21, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On November 2, 1993, Tele-Media Company of North Carolina ("Tele-Media") filed a timely petition for reconsideration challenging the certification of the Alamance County, North Carolina ("Alamance") to regulate rates for basic cable service and associated equipment.[1] Alamance filed an opposition to which Tele-Media filed a reply. In addition, Alamance filed a response in answer to Tele-Media's reply.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[2] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[3] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[4] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[5] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[6]

II. DISCUSSION

3. Tele-Media argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the households in the unincorporated areas of Alamance County, its franchise area.[7] Specifically, Tele-Media states that in its franchise area it serves 1,530 of the "approximately 5,573 households, based upon local census information and marketing data," or 27 percent of the total number of "households" within its franchise area. Tele-Media's petition is supported by a declaration under penalty of perjury from a company official attesting to the accuracy of the information provided. However, Tele-Media does not provide copies of the census information and marketing data it claims to have relied upon, nor does it provide a citation to a verifiable reference source. Moreover, there is no indication from the petition as to how Tele-Media is using the term "households." Pursuant to our rules, households refers to occupied housing units.[8]

4. In its opposition, Alamance disputes Tele-Media's penetration level. It states that Tele-Media has a franchise to serve the eastern portion of Alamance County and that according to the 1990 Census, there are only 3,704 "households" in Tele-Media's franchise area.[9] Comparing Tele-Media's alleged number of households served (1,530) with the number of households that are in Tele-Media's actual franchise area, Alamance argues that Tele-Media's penetration level is approximately 41 percent. In addition, Alamance argues that the addition of the number of subscribers served by Cablevision of Alamance, another cable operator authorized to serve in Alamance County, yields a total percentage of 43 percent of households receiving ca-

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[1] Alamance filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" ("FCC Form 328") on October 14, 1993. The certification became effective on November 13, 1993.

[2] Communications Act of 1934 § 623(a)(4); 47 U.S.C. § 543(a)(4).

[3] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[4] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt or administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition.47 C.F.R. § 76.910(b). *See also* Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[5] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[6] 47 C.F.R. § 76.911(c).

[7] The 1992 Cable Act (Communications Act of 1934 § 623(a)(2); 47 U.S.C. § 543(a)(2)) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases on which a cable system is deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the system's service. Communications Act of 1934 § 623(l)(1)(A); 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

[8] *See Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). As the Commission stated in the *Third Recon. Order*, "[a]s used in the Cable Act, we presume that Congress did not intend households' to have a different meaning than in the 1990 Census that would include vacant units or even partial year vacant units." *Third Recon. Order, supra*. The term "household" is defined for purposes of the 1990 Census data as "all the persons who occupy a housing unit." Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. Thus, the term "households" reflects only occupied housing units.

[9] Alamance does not provide a copy of the relevant pages of the 1990 Census on which it relies. In addition, it is not clear

ble service in Alamance County.[10] Finally, Alamance argues that the proper interpretation of the Commission's low penetration effective competition test is a measure based on the number of households served in relation to the number of households passed by a cable system.[11]

5. In reply, Tele-Media maintains that it has a franchise for all unincorporated areas of Alamance County. As support, Tele-Media refers to a section within the "Ordinance Establishing the Conditions For Awarding Franchises for Cable Television Systems." Tele-Media claims that this ordinance permits Tele-Media to provide cable television service throughout all unincorporated areas of Alamance County. Tele-Media does not provide a copy of this document. Next, Tele-Media maintains that there are 5,573 "homes" within its franchise area. It claims that Alamance's number (3,704) is inappropriately based on the number of "homes passed."

6. In a response to Tele-Media's reply, Alamance again argues that Tele-Media's claim that it has a non-exclusive franchise to serve all the unincorporated areas of Alamance County is "completely untrue." As support, Alamance submits a copy of an ordinance which granted the franchise for the area served by Tele-Media.[12] Alamance states that this authorized area of service actually represents less than one third of the unincorporated area of Alamance County.

7. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[13] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within the franchise area.[14] Tele-Media has failed to meet this burden.

8. Tele-Media has not submitted sufficient evidence refuting Alamance County's claim that Tele-Media has failed to base its effective competition claim on the area that Tele-Media is authorized to serve. Although Tele-Media claims that its franchise area is all of the unincorporated areas of Alamance County, it submits inadequate support for this claim. Tele-Media refers to an ordinance which it claims grants it authority to serve all of the unincorporated areas of Alamance County; however, it does not provide a copy of the relevant language of this ordinance. On the other hand, Alamance does submit a copy of an ordinance which grants a franchise to Tele-Media's predecessor, Tarheel Cablevision, to serve "a portion of Alamance County surrounding the Town of Mebane on the eastern edge of the County." This document appears to support Alamance's claim that Tele-Media's franchise area consists of the eastern portion of the Alamance County.

9. Next, Tele-Media has not supported its effective competition claim with adequate documentation. Our rules require the use of data reflecting the number of households (*i.e.*, occupied housing units) in the franchise area. Although Tele-Media's petition makes an assertion concerning the number of households in the franchise area, it does not submit sufficient information upon which to determine whether its effective competition claim is based on "household" data as that term is used by the Commission, and it does not provide any back-up documentation or a citation to a verifiable source. In light of this, we will deny Tele-Media's petition. Should Tele-Media wish to submit more specific information sufficient to demonstrate the presence of effective competition, it may submit such information by filing a petition for revocation pursuant to Section 76.914 of the Commission's rules. *See* 47 C.F.R. § 76.914(d).

III. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Tele-Media of North Carolina challenging the certification of Alamance County, North Carolina to regulate basic cable rates IS DENIED.

11. IT IS FURTHER ORDERED that the automatic stay imposed by Section 76.911(c) of the Commission's Rules, as amended, 47 C.F.R. § 76.911(c) IS TERMINATED.

12. IT IS FURTHER ORDERED that Tele-Media of North Carolina SHALL FILE the required rate justifications on the applicable forms with Alamance County, NC within thirty (30) days of the release date of this *Memorandum Opinion and Order* or within thirty (30) days of receipt of notice from Alamance County that it is regulating Tele-Media's rates, whichever is later.

13. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

how Alamance is using the term "households."

[10] As the Commission noted in its first *Rate Order*, the low penetration effective competition test measures the number of households served by the cable system in question (*i.e.*, the petitioning cable system) in relation to the number of households in the cable system's franchise area. *Rate Order*, at 5648. The subscribership of another cable system serving the same franchise area is not relevant to this test.

[11] This "homes passed" test was explicitly rejected by the Commission in its *First Order On Reconsideration, Second Report and Order and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, 9 FCC Rcd 1164 (1993).

[12] Alamance explains that the franchise was originally granted to Tarheel Cablevision, but was subsequently transferred by "mesne conveyances" to Tele-Media Company.

[13] 47 C.F.R. § 76.906.

[14] 47 C.F.R. § 76.911(b)(1).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

VALLEY CENTER CABLESYSTEMS, L.P.

Petition for Reconsideration

of Certification of
San Diego County, California
to Regulate Basic Cable Service Rates
(FCC Community ID Nos. CA0620, CA1298)[1]

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1994; Released: December 23, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On November 2, 1993, Valley Center Cablesystems, L.P. ("VCC") filed a timely petition for reconsideration, challenging the certification of San Diego County, California ("the County") to regulate VCC's basic cable service and associated equipment rates.[2] The County filed an opposition to which VCC filed a reply. In response to a Commission request for additional information,[3] VCC and the County each filed a supplement to their original pleadings on August 4, 1994 and August 5, 1994, respectively. VCC filed a supplementary pleading on August 19, 1994, responding to a Commission Order.[4]

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate the basic cable service rates of cable operators which are not subject to effective competition.[5] For purposes of the initial request for certification, a franchising authority may rely on the presumption that cable operators within its jurisdiction are not subject to effective competition, unless the franchising authority has actual knowledge to the contrary.[6] Such certification becomes effective thirty days from the date of filing, unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[7] Cable operators may file petitions for reconsideration of the franchising authority's certification within thirty days from the date such certification becomes effective.[8] Rate regulation is automatically stayed pending review of a timely filed petition for reconsideration alleging effective competition.[9]

II. DISCUSSION

3. VCC argues that its cable system is subject to effective competition in unincorporated San Diego County, the franchise area, because it serves fewer than thirty percent of the households in the franchise area.[10] VCC contends that there are 127,665 households (that is, occupied housing units)[11] in unincorporated San Diego County. VCC states that it serves 2,041 subscribers or 1.5 percent of the households in the franchise area. As support, VCC submits a copy of the relevant page from the 1990 Census data which indicates that there are 127,665 households (that is, occupied housing units) in unincorporated San Diego County. In addition, VCC submits a marketing report, prepared for September 1993, which indicates that VCC has 2,041 subscribers.

4. The County does not challenge VCC's statistical data directly, but instead argues that the applicable franchise area is less than all of unincorporated San Diego County. The County's objection to VCC's petition is based on its contention that VCC has made an affirmative decision to

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[1] CA0620 (Pauma Valley) and CA1298 (Valley Center) constitute portions of a single franchise area. The franchise agreement by its terms covers all of unincorporated San Diego County. According to VCC, the communities were registered separately at the Commission because they represented two different areas within unincorporated San Diego County and were originally served by two separate cable systems. The systems were integrated in 1992 with trunk line through uninhabited mountains connecting the two population centers. Supplement of VCC dated August 4, 1994 at 1 and n1.

[2] The County filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" ("FCC Form 328") on September 7, 1993. Its certification became effective October 7, 1993.

[3] Letter from Lisa M. Higginbotham to Steven J. Horvitz, Attorney for Valley Center Cablesystems, L.P., and Dennis Manyak, San Diego County Cable TV Review Commission (July 26, 1994).

[4] *Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994).

[5] 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. § 76.906, 76.910(b)(4).

[7] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt and the personnel to administer, rate regulation; (3) procedural laws and regulations, applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for the consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition.47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[8] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking* in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[9] 47 C.F.R. § 76.911(c)(1).

[10] The Commission's rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. The Commission's rules further provide that a cable system is subject to effective competition if fewer than thirty percent of the households in the franchise area subscribe to the cable service of a cable system. 47 C.F.R. §§ 76.905(a) and (b)(1).

[11] As the Commission stated recently, "we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, in MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

limit its actual service area.[12] While the franchise agreement establishes the franchisearea as "county-wide", the County contends, VCC, has made an affirmative decision to limit its area to include only Pauma Valley and Valley Center. Within its redefined franchise area, consisting of fewer households, the County asserts that VCC is not subject to effective competition because its penetration level exceeds thirty percent.

5. In response, VCC argues that its franchise area is plainly established by the franchise agreement. Moreover, it argues that it has not acted in any way to restrict the scope of that franchise area. VCC reports various attempts to expand coverage beyond Pauma Valley and Valley Center, including a partial construction of a system in Rainbow some twenty miles north of Valley Center. The County concedes these facts to be true, but contends that VCC has not extensively provided service outside Pauma Valley and Valley Center.

6. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[13] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, defined by §76.905 of the Commission's rules, is present within its franchise area.[14] VCC has met this burden.

7. As a preliminary matter, we are unpersuaded that the appropriate franchise area for purposes of effective competition is something less than all of the unincorporated areas of San Diego County. The County argues that VCC has redefined its franchise area to such an extent that its competition demonstration must be based on its current service area. We disagree. The franchise agreement between VCC and the County designates VCC's authorized service area "to be county-wide with primary responsibility for providing service to Valley Center and Pauma Valley general area." VCC states that it is attempting to expand its coverage, but claims costs are slowing its efforts. The County concedes that VCC is in fact expanding its cable service but argues only that it has not "extensively built outside its service area." However, as the Commission has stated previously, the fact that a franchise area has not as yet been filled out entirely by system construction, would not by itself be evidence that the service area had been redefined.[15] Therefore, we find that the County has failed to sustain its burden of proof that American has redefined its franchise area.

8. VCC appropriately relied on data reflecting the number of households as required by our rules.[16] Relying on this data, VCC has submitted sufficient evidence demonstrating that its cable system serving the unincorporated areas of San Diego County, its franchise area, serves 2,041 of the 127,665 households or 1.5 percent of the households, within its franchise area. Thus, we find that VCC's system serving the unincorporated area of San Diego County is subject to effective competition. Accordingly, its petition, is granted.

III. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that the petition for reconsideration, filed by Valley Center Cablesystems, L.P., challenging the certification of San Diego County, California to regulate rates, IS GRANTED.

10. IT IS FURTHER ORDERED that the Certification of San Diego County to regulate the basic cable service rates of Valley Center Cablesystems, L.P., IS RESCINDED.

11. This action is taken pursuant to delegated authority under § 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[12] In its First Order on Reconsideration, the Commission clarified its definition of "franchise area" for purposes of determining effective competition. *First Order on Reconsideration, Second Report and Order and Third Notice of Proposed Rulemaking* in MM Docket No. 92-266, 9 FCC Rcd 1164 (1993) (*"First Recon. Order"*). Generally, "[a] franchise area is the area a system operator is granted authority to serve in its franchise." *Id.* at 1180. The Commission stated, however, that a more restrictive definition of "franchise area" may be more appropriate under limited circumstances, such as when an operator, itself, "through its own conduct, self-defined the areas to be served to such an extent that this redefined area accurately portrays the operator's 'franchise area.'" *Id.* at 1181. Under this standard, the franchising authority has the burden of showing that the operator has made an "affirmative decision... to restrict service... ." *Id.*

[13] 47 C.F.R. §76.906.

[14] 47 C.F.R. §76.911(b)(1).

[15] *First Recon. Order, supra.*

[16] *Third Recon. Order, supra.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

C-TEC Cable Systems
of Michigan, Inc.

Petition for Reconsideration

of the Certification of
Reynolds Township, Michigan
to Regulate Basic Cable Service Rates
FCC Community ID No. (MI1627)

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1994; Released: December 23, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On October 28, 1993, C-TEC Cable Systems of Michigan, Inc. ("C-TEC"), filed a timely Petition for Reconsideration of Certification challenging the certification of Reynolds Township, Michigan ("Reynolds Township" or "The Township") to regulate the system's basic service rates in Reynolds Township.[1] Reynolds filed an objection, to which C-TEC filed a reply. In addition, both parties filed additional pleadings pursuant to the Commission's July 29, 1994 Order.[2] Finally, both parties filed replies to information letter requests from the Commission.[3]

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[4] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[5] Certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[6] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[7] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[8]

II. DISCUSSION

3. C-TEC argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the households in its Reynolds Township franchise area.[9] The supplement to C-TEC's petition indicates that C-TEC serves only 148 of the 591 occupied housing units, or 25 percent of the total number of occupied housing units.[10] As supporting documentation, C-TEC provides a copy of the relevant page from the 1990 Census data[11] which shows that there are 1,060 occupied housing units in Reynolds Township. C-TEC states that it subtracted the 469 occupied housing units listed in the 1990 Census in Howard City from the 1,060 occupied housing units listed in the 1990 Census for Reynolds Township and Howard City to derive the 591 occupied housing units in its Reynolds Township franchise area, which does not include Howard City. C-TEC also submits a computer print-out with sufficient subscriber information to support its claim that it serves 148 subscribers.

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[1] Reynolds Township filed a Certification of Franchising Authority to Regulate Basic Cable Rates and Initial Finding of Lack of Effective Competition ("FCC Form 328"), with the Commission on October 7, 1993. Certification became effective on November 8, 1993.

[2] *Cable Operators' Petition for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd. 3656 (1994) (*"Effective Competition Order"*).

[3] Letters from Daren A. Benzi to Jacqueline P. Cleary, Attorney for C-TEC Cable Systems of Michigan, dated November 25, 1994, and to John W. Pestle, Attorney for Reynolds Township, dated December 9, 1994.

[4] Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[5] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[6] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition, 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[7] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[8] 47 C.F.R. § 76.911(c).

[9] The 1992 Cable Act (Communications Act of 1934, § 623(a)(2), 47 U.S.C. § 543(a)(2)) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases by which a cable system will be deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the cable service of the cable system. Communications Act of 1934 § 623(l)(1)(A), 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

[10] As the Commissions stated recently, "we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units. *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

[11] As the Bureau has stated previously, the 1990 Census is an appropriate source for household data. *Effective Competition Order*, *supra*.

4. In response, Reynolds argues that C-TEC has chosen to limit its actual service area even though C-TEC's franchise area does not restrict service to a specific area of the Township. As a result, Reynolds claims that C-TEC has redefined the franchise area for purposes of the effective competition standard.[12] Reynolds claims that, to the best of the Township shinformation and belief, there are no more than 350 households in the C-TEC service area. Considering C-TEC's subscriber information, Reynolds claims C-TEC is not subject to effective competition.

5. In reply, C-TEC claims that the Township has failed to meet its burden of demonstrating that the franchise area has been redefined. C-TEC argues that it has not decided to restrict service to specific areas of the Reynolds Township franchise area. C-TEC claims that the terms of the franchise agreement require it to expand service into unserved areas of the community when the population density reaches a level of five households per 660 feet (equivalent to 40 households per cable mile). C-TEC believes that it is in full compliance with the franchise agreement. In addition C-TEC asserts that it has urged the franchising authority to notify C-TEC of unserved communities in the franchise area that meet the density level set forth in the franchise agreement or that otherwise would be economically feasible to serve. C-TEC states that it has expressed a willingness to provide service to additional communities within the franchise area as the population density increases or as it becomes economically feasible to do so. C-TEC adds that the mere presence of unserved areas does not automatically indicate an affirmative choice by the cable operator to limit service to specific communities.

6. As a preliminary matter, we are unpersuaded that the relevant franchise area for purposes of determining the presence of effective competition in this case is some area other than the entire Reynolds Township. Specifically, Reynolds has not provided any evidence that C-TEC has made an affirmative decision to restrict its service. Reynolds merely argues that C-TEC currently serves only a limited area within the Township, although the franchise agreement between the C-TEC and Reynolds does not limit C-TEC's service area. Such an argument is insufficient to support a claim that a cable operator has made an affirmative decision to redefine its franchise area. As the Commission has stated "[t]he fact that a franchise area has not yet been filled out by the construction of a system would not by itself be taken as redefining the service area."[13]

7. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[14] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within the franchise area.[15] C-TEC has met that burden. C-TEC appropriately relied on data reflecting the number of households as required by our rules.[16] Relying on this data, C-TEC has submitted sufficient eidence demonstrating that its cable system serves fewer than 30 percent of the households within its franchise area. Thus, we find that C-TEC's system serving Reynolds Township is subject to effective competition. Accordingly, its petition is granted.

III. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that the petition for reconsideration filed by C-TEC Cable Systems of Michigan, Inc. challenging the certification of Reynolds Township, Michigan IS GRANTED.

9. IT IS FURTHER ORDERED that the certification of Reynolds Township to regulate C-TEC's basic cable service rates IS RESCINDED.

10. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[12] In our *First Order on Reconsideration* we clarified our definition of "franchise area" for purposes of determining effective competition. *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, 9 FCC Rcd 1164 (1993) (*"First Recon. Order"*). Generally, "[a] franchise area is the area a system operator is granted authority to serve in its franchise." *Id.* at 1180. We stated, however, that a more restricted definition of "franchise area" may be more appropriate under limited circumstances, such as when an operator "has itself, through its own conduct, self defined the areas to be served to such an extent that this redefined area accurately portrays the operator's 'franchise area.'" *Id.* at 1181. Under this standard, the franchising authority has the burden of showing that the operator has made an "affirmative decision . . . to restrict service." *Id.*

[13] *See First Recon. Order, supra.*

[14] 47 C.F.R. § 76.906.

[15] 47 C.F.R. § 76.911(b)(1).

[16] *See Third Recon. Order, supra.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WILLOW PARK CABLE TV

Petition for Reconsideration
of Certification of the
City of Burleson (TX1999)
to Regulate Basic Cable Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1994; Released: December 23, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On November 1, 1993, Willow Park Cable TV ("Willow Park") filed a timely petition for reconsideration challenging the certification of the City of Burleson ("Burleson") to regulate rates for basic cable service and associated equipment.[1] On August 19, 1994, Willow Park filed a supplement to its original petition pursuant to a recent Commission Order.[2] Burleson did not file an opposition to Willow Park's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless the franchising authority has actual knowledge to the contrary.[4] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[6] Regulation of rates is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[7]

II. DISCUSSION

3. Willow Park argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the households in Burleson City, its franchise area.[8] Willow Park claims that it serves only 44 of the 4,693 "occupied housing units" within its franchise area, or .10 percent of the total number of occupied housing units. As supporting documentation, Willow Park submits a copy of the 1990 Census data[9] which indicates that there are 4,693 occupied housing units in Burleson City. In addition, Willow Park submits a declaration under penalty of perjury by a responsible official certifying that, based on a visual inspection of 173 homes that its system passes, it has determined that it has 44 subscribers to its system as of October 1993.[10] Willow Park explains that, because of its size, it traditionally did not maintain current subscriber records.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[11] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within the franchise area.[12] Willow Park has met this burden. Specifically, Willow Park appropriately relied on data reflecting the number of households as required by our rules.[13] Relying on this data, Willow Park has submitted sufficient evidence demonstrating that its cable system serving the City of Burleson, its franchise area, serves 44 of the 4,693 households, or .10 percent of the households within its franchise area. Thus, we find that Willow Park's system serving the City of Burleson is subject to effective competition. Accordingly, its petition is granted.

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[1] The City of Burleson filed a Certification of Franchising Authority to Regulate Basic Cable Rates and Initial Finding of Lack of Effective Competition (FCC Form 328) with the Commission on September 3, 1993. Certification became effective on October 2, 1994.

[2] *Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*).

[3] 47 U.S.C. § 543(a)(4).

[4] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition.47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[7] 47 C.F.R. § 76.911(c).

[8] The Cable Act and the Commission's rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. The Cable Act and the Commission's rules further provide that a cable system is subject to effective competition if fewer than 30 percent of the households in the system's franchise area subscribe to the system's cable service. 47 U.S.C. § 543(a)(2) and (1)(1)(A); 47 C.F.R. § 76.905(a) and (b)(1).

[9] As the Commission has stated recently, the 1990 Census data is an appropriate source for household data. *Effective Competition Order*, *supra*.

[10] Declaration of Donald Arndt, Partner Cambridge Communications, Managing Agent for Willow Park Cable TV, dated August 18, 1994.

[11] 47 C.F.R. § 76.906.

[12] 47 C.F.R. § 76.911(b)(1).

[13] *Third Recon. Order*, *supra*.

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED, that the petition for reconsideration filed by Willow Park Cable TV challenging the certification of the City of Burleson, TX to regulate basic cable service rates IS GRANTED.

6. IT IS FURTHER ORDERED that the certification of the City of Burleson, TX to regulate Willow Park Cable TV's basic cable service rates IS RESCINDED.

7. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, as amended, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HORIZON CABLE I LIMITED PARTNERSHIP

Petition for Reconsideration

of Certification of
Grass Lake Township
to Regulate Basic Cable Service Rates
(MI1089)

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1994; Released: December 23, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On November 12, 1993, Horizon Cable I Limited Partnership ("Horizon") filed a timely petition for reconsideration challenging the certification of Grass Lake Township ("Grass Lake" or the "Township") to regulate the system's rates for basic cable service and associated equipment.[1] Grass Lake filed an Objection to Petition for Reconsideration to which Horizon filed a reply. In addition, both parties filed additional pleadings pursuant to the Commission's July 29, 1994 Order.[2] Finally, Horizon submitted a supplement dated December 6, 1994 to clarify previously-filed information.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless the franchising authority has actual knowledge to the contrary.[4] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[6] Regulation of rates is automatically stayed pending review of a timely-filed petition for reconsideration alleging effective competition.[7]

II. DISCUSSION

3. Horizon argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the households in Grass Lake Township, its franchise area.[8] Horizon claims that it serves only 174 of the 1,270 occupied housing units in Grass Lake Township, or 13.7 percent of the total number of "households." As supporting documentation, Horizon provides a copy of the relevant page of the 1990 Census data[9] which shows that there are 1,270 occupied housing units[10] in Grass Lake Township. Horizon also submits a computer printout with sufficient subscriber information to support its claim that it serves 174 subscribers in the franchise area as of October 21, 1993. Finally, Horizon provides a declaration under penalty of perjury from a responsible official certifying the accuracy of the data included in the petition.

4. In its objection to Horizon's petition, Grass Lake argues that Horizon is not subject to effective competition because it has "redefined" its franchise area. Grass Lake alleges that Horizon has made an affirmative decision to limit its service area to specific areas in Grass Lake even though its franchise does not restrict service to a specific area of the Township.[11] According to Grass Lake, Horizon's

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[1] Grass Lake filed its Certification of Franchising Authorities to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition ("FCC Form 328") on October 1, 1993. Its certification became effective on November 1, 1993.

[2] *Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*).

[3] Communications Act of 1934 § 623 (a)(4), 47 U.S.C. § 543(a)(4).

[4] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulation; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for the consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[7] 47 C.F.R. § 76.911(c)(1).

[8] The 1992 Cable Act (Communications Act of 1934 § 623(a)(2), 47 U.S.C. § 543(a)(2)) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases upon which a cable system will be deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the system's cable service. Communications Act § 623(l)(1)(A), 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

[9] As the Bureau has stated recently, the 1990 Census data is an appropriate source for household data. *Effective Competition Order*, *supra*.

[10] As the Commission stated recently "we presume that Congress did not intend households' to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, 1990 Census of Population and Housing, Summary Population and Housing Characteristics, Michigan, 1990 CPH-1-41 Appendix B at B-8.

[11] In its *First Order on Reconsideration* the Commission clari-

actual service area consists of 454 households, of which Horizon serves 174.[12] As support, Grass Lake submits a map of Grass Lake Township, with handwritten notations that show Horizon's alleged "franchise area" for purposes of the effective competition standard. Under this redefined franchise area, Grass Lake argues that Horizon actually serves 38 percent of households, and therefore is not subject to effective competition.

5. In its reply, Horizon denies affirmatively restricting its cable service to limited areas of Grass Lake Township. Horizon points out that its franchise agreement with Grass Lake requires Horizon to expand into unserved areas of the Township when the population density reaches a level of 25 households per cable mile. Horizon states that it is in full compliance with the franchise agreement, and that it plans to expand service within Grass Lake Township by approximately 15 percent during the next year. In addition, Horizon states that it has urged officials to notify it whenever they become aware of new development so that Horizon can plan further expansion of the system. Horizon concludes that, "[r]ather than restricting its service to a small portion of the franchise area, Horizon has expressed a willingness to provide service to additional homes within the franchise area as the population density increases," and that the mere presence of unserved areas within the franchise area does not limit service to specific communities.

6. As a preliminary matter, we are unpersuaded that the relevant franchise area for purposes of determining the presence of effective competition in this case is some area other than the entire Grass Lake Township. The Township's argument is based on the number of subscribers served by Horizon in relation to the number of households that Horizon's cable system passes. The Commission, however, specifically rejected this test as a measure of determining the presence of effective competition.[13] As the Commission stated previously, generally "[a] franchise area is the area a system operator is granted authority to serve in its franchise."[14] As such, the correct measure for determining whether a cable system serves fewer than 30 percent of the households in the franchise area is by comparing the number of subscribers served by Horizon's cable system to the total number of households in the franchise area.

7. To the extent that the Township suggests that Horizon has intentionally redefined its franchise area to encompass only the 454 households it currently passes, we find no evidence to support such an assertion. The Township provides no evidence that Horizon has redefined its franchise area. The Township simply asserts that Horizon passes only 454 households. This assertion, in and of itself, is an insufficient basis upon which to find that a cable operator has made an affirmative decision to restrict its service area. As the Commission has stated "[t]he fact that a franchise area has not yet been filled out by the construction of a system would not by itself be taken as redefining the service area."[15] Moreover, the franchise agreement between the parties clearly dictates the terms of expansion for Horizon's operations. As the Township has offered no evidence that Horizon has not complied with the terms of the franchise agreement, and offers no other evidence that Horizon has redefined its franchise area, we conclude that the Township has not met its burden of proving that Horizon has redefined its franchise area.

8. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[16] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within the franchise area.[17] Horizon has met this burden. Horizon appropriately relied on data reflecting the number of households as required by our rules.[18] Relying on this data, Horizon has submitted sufficient evidence demonstrating that its cable system serving Grass Lake Township, its franchise area, serves 174 of the 1,270 households, or 13.7 percent of the households, within its franchise area. Thus, we find Horizon's system serving Grass Lake Township is subject to effective competition. Accordingly, its petition is granted.

III. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Horizon Cable 1 Limited Partnership challenging the certification of Grass Lake Township to regulate Horizon's basic cable rates IS GRANTED.

10. IT IS FURTHER ORDERED that the certification of Grass Lake Township to regulate Horizon's basic cable rates IS RESCINDED.

11. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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fied its definition of "franchise area" for purposes of determining effective competition. *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, 9 FCC Rcd 1164 (1993) (*"First Recon. Order"*) . Generally, "[a] franchise area is the area a system operator is granted authority to serve in its franchise." *Id.* at 1180. The Commission stated, however, that a more restricted definition of "franchise area" may be more appropriate under limited circumstances, such as when an operator "has itself, through its own conduct, self defined the areas to be served to such an extent that this redefined area accurately portrays the operator's 'franchise area.'" *Id.* at 1181. Under this standard, the franchising authority has the burden of showing that the operator has made an "affirmative decision . . . to restrict service." *Id.*

[12] Grass Lake bases its household data upon a survey conducted for the Township Supervisor. Grass Lake did not furnish documentation of the survey.

[13] *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, 9 FCC Rcd 1164, 1180 (1993) (*"First Recon. Order"*).

[14] *Id.*

[15] *First Recon. Order, supra.*

[16] 47 C.F.R. §76.906.

[17] 47 C.F.R. §76.911(b).

[18] *Third Recon. Order, supra.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TWIN COUNTY TRANS VIDEO, INC.
d/b/a TWIN COUNTY CABLE

Petition for Reconsideration

of Certification of
Township of Salisbury, PA
to Regulate Basic Cable Service Rates
(PA0570)

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1994; Released: December 23, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On December 13, 1993, Twin County Trans Video, Inc. d/b/a Twin County Cable ("Twin County") filed a timely Petition for Reconsideration challenging the certification of the Township of Salisbury, Pennsylvania ("Township") to regulate rates for basic cable service and associated equipment.[1] On August 19, 1994, Twin County submitted a supplemental pleading in response to the Commission's July 29, 1994 Order.[2] The Township did not file an opposition to Twin County's Petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[4] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[6] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[7]

II. DISCUSSION

Petitioner's Contentions

3. Twin County alleges that it meets two of the three alternative tests for demonstrating the presence of effective competition in the franchise area.[8] First, Twin County argues that its cable system serving Salisbury Township, its franchise area, serves fewer than 30 percent of the households in the franchise area.[9] Alternatively, Twin County argues that it meets the competitive provider test for effective competition set forth in the 1992 Cable Act.[10]

4. With respect to the low penetration test, Twin County argues that it serves 1,311 of the 4,836 households (that is, occupied housing units),[11] or 27 percent of the total num-

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[1] The Township filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" on October 14, 1993, which became effective on November 13, 1993.

[2] *Cable Operator's Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*).

[3] Communications Act of 1934 §623(a)(4), 47 U.S.C. §543(a)(4).

[4] 47 C.F.R. §§76.906, 76.910(b)(4).

[5] 47 C.F.R. §76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, or personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. §76.910(b). *See also* Communications Act of 1934 §623(a)(4), 47 U.S.C. §543(a)(4).

[6] 47 C.F.R. §§1.106, 76.911. *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993) (*"Rate Order"*).

[7] 47 C.F.R. §76.911(c).

[8] *See* Communications Act of 1934 §623(l)(1)(A), 47 U.S.C. §543(l)(1)(A) (under the low penetration test, cable operators are deemed subject to effective competition if "fewer that 30 percent of the households in the franchise area subscribe to the cable service of a cable system."); Communications Act of 1934 §623(l)(1)(B), 47 C.F.R. §543(l)(1)(B) (under the competitive provider test, cable operators are deemed subject to effective competition if "the franchise area is (i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area."); Communications Act of 1934 §623(l)(1)(C), 47 U.S.C. §543(l)(1)(C) (under the municipal provider test, cable operators are deemed subject to effective competition if "a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area.").

[9] The Commission's low penetration effective competition test provides that a cable system is subject to effective competition if fewer than 30 percent of the households in the system's franchise area subscribe to the system's service. Communications Act of 1934 §623(l)(1)(A), 47 U.S.C. §543(l)(1)(A); 47 C.F.R. §76.905(b)(1).

[10] *See* n.8, *supra*.

[11] As the Commission stated recently, "we presume that Congress did not intend 'households' to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). The count

ber of households in its franchise area. As supporting documentation, Twin County provides 1990 Census data[12] which shows that there are 4,836 households in Salisbury. Twin County also submits a computer print-out with sufficient subscriber information to support its claim that it serves 1,311 subscribers in the franchise area.

Disposition of Twin County's Effective Competition Claims

5. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[13] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within its franchise area.[14] Based on the evidence presented, we find that Twin County has met this burden. Twin County has appropriately relied on data reflecting the number of households as required by our rules.[15] Relying on this data, Twin County has submitted sufficient evidence demonstrating that its cable system serves fewer than 30 percent of the households in its franchise area. Thus, we find that Twin County's system serving Salisbury Township is subject to effective competition under the low penetration test.[16]

III. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by Twin County Trans Video, Inc. d/b/a Twin County Cable challenging the Certification of the Township of Salisbury, Pennsylvania IS GRANTED.

7. IT IS FURTHER ORDERED that the certification of the Township of Salisbury, Pennsylvania to regulate the basic cable rates of Twin County Trans Video, Inc. d/b/a Twin County Cable IS RESCINDED.

8. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules.[17]

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

[12] As the Commission stated in the *Effective Competition Order*, the 1990 Census is an appropriate source for household data. *Effective Competition Order, supra*.

[13] 47 C.F.R. §76.906.

[14] 47 C.F.R. §76.911(b)(1).

[15] *Third Order on Reconsideration*, MM Docket No. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*).

[16] Because we find that Twin County is subject to low penetration effective competition in its franchise area, we need not address its alternative argument presented pursuant to the competitive provider effective competition test.

[17] 47 C.F.R. §0.321.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Participation by COMSAT Corporation in a New Inmarsat Satellite System Designed to Provide Service to Handheld Communications Devices — File No. ISP-95-003

ORDER

Adopted: December 16, 1994; Released: December 16, 1994

By the Chief, International Bureau:

1. On December 1, 1994, TRW, Inc. filed an "Emergency Motion for Temporary Relief," asking the Commission to issue certain orders to COMSAT Corporation regarding COMSAT's proposed investment in Inmarsat[1] COMSAT, in accordance with our applicable rule,[2] filed its opposition to the TRW Emergency Motion on December 8.

2. Also on December 8, Motorola filed "Comments in Support of TRW's Emergency Motion for Temporary Relief." On December 12, 1994, COMSAT moved to strike the Motorola pleading on the ground that section 1.45(d) of our rules permits only oppositions to motions for emergency relief, not comments in support. In the alternative, COMSAT requests leave to respond to Motorola's submission.

3. Motorola has not yet responded to COMSAT's motion to strike, and its time for doing so has not yet expired.[3] However, in light of the emergency nature of TRW's underlying motion, we find it necessary to resolve COMSAT's motion to strike without waiting for the expiration of the full, non-emergency filing period.[4] We now deny COMSAT's motion to strike but grant COMSAT's alternative request for leave to respond.

DISCUSSION

4. COMSAT's motion is based on the plain language of section 1.45(d), which provides, "*Oppositions* to a request for stay of any order or to a request for other temporary relief shall be filed within 7 days after the request is filed. Replies to oppositions should not be filed and will not be considered."[5] COMSAT notes that Motorola's submission is not an "opposition" and that nothing in section 1.45(d) authorizes the filing of any comments other than oppositions. COMSAT argues further that the overall purpose evident in section 1.45(d) -- namely, the truncation of the pleading cycle in matters requiring expedited review -- demands that we reject pleadings in support of the original motion. Otherwise, COMSAT argues, supporting comments could be filed on the last day for "oppositions," and the rule's express prohibition on replies would prevent the motion's opponents from ever responding to the supporting comments.

5. We agree with COMSAT's interpretation of section 1.45(d). The clear purpose of the rule is to shorten the pleading cycle applicable to motions for stays or other temporary relief. In such cases, the movant is given one and only one chance to present the arguments in favor of relief, and any opponents of the motion are given one and only one chance to present the arguments against such relief. To allow comments in support of the original motion would require the Commission either to deny the opponents any opportunity to respond to the additional supportive comments, or to create an additional round of pleadings in violation of the rule's language and intent.[6] Accordingly, Motorola's "Comments in Support" should not have been filed.

6. However, we have received, read, and carefully considered Motorola's "Comments in Support," and we cannot pretend otherwise in deciding TRW's motion. To grant its motion to strike would give COMSAT relief in form, but not in fact. We therefore choose to afford COMSAT additional time to respond to Motorola's pleading.[7] COMSAT shall file any response to Motorola's pleading before the close of business on December 22, 1994. No other filing shall be accepted regarding this motion, whether from TRW, Motorola, or any other interested person.

7. We do not intend in this Order to signal that comments in support of motions for temporary relief shall henceforth be accepted in spite of section 1.45(d). On the contrary, we hope it is now clear that such pleadings are not appropriate and will not be accepted. The Bureau's staff will refrain from reading any portion of such pleadings in the future, which should generally eliminate the need for any corrective action such as the one we order today.

8. Accordingly, IT IS ORDERED that COMSAT's Motion to Strike Unauthorized Comments is hereby DENIED.

9. IT IS FURTHER ORDERED that COMSAT be permitted to file a response to Motorola's December 8, 1994 pleading in this matter at any time before the close of business on December 22, 1994.

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[1] *See generally* In re Petition of Motorola Satellite Communications, Inc. for Declaratory ruling Concerning Participation by COMSAT Corporation in a New Inmarsat Satellite System Designed to Provide Service to Handheld Communications Devices, FCC 94-296 (adopted Nov. 17, 1994).

[2] 47 C.F.R. § 1.45(d).

[3] 47 C.F.R. § 1.45(a).

[4] *See* 47 C.F.R. § 1.3 (suspension or waiver of Commission's rules); *cf.* 47 C.F.R. § 1.45(e) (*ex parte* disposition of certain motions).

[5] 47 C.F.R. § 1.45(d) (emphasis added).

[6] Of course, we do not view section 1.45(d) as an impediment to the Commission putting any matter on public notice -- even a motion for temporary relief on which expedited review has been requested.

[7] COMSAT suggests that such a course of action can be harmonized with section 1.45(d) by treating Motorola's comments as a new, affirmative request for relief (the same relief TRW requested), so that COMSAT should be allowed not a "reply," but an "opposition" to the Motorola request. This analogy stumbles over the fact that we still have before us only one motion, not two. We prefer to acknowledge that we are waiving strict interpretation of our procedural rule in the interest of fairness and candor in our decision making process.

10. IT IS FURTHER ORDERED that this Order be effective upon its adoption on **December 15, 1994**.

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
December 20, 1994

Released: December 23, 1994

IN REPLY REFER TO:
DA 94-1568

Peter H. Feinberg, Esq.
Dow, Lohnes & Albertson
1255 Twenty-Third Street
Washington, D.C. 20037-1194

Dear Mr. Feinberg:

This letter is in response to your letter of December 15, 1994 on behalf of Cox Communications, Inc. ("Cox"), requesting expedited clarification of the Commission's notice requirement and quarterly rate adjustment mechanism as applied to new channel additions to cable programming service tiers ("CPSTs") in the first quarter of 1995. Specifically, you request the Commission waive the quarterly rate filing limitation for the first quarter of 1995. In tandem with this request, you seek a waiver of the notice requirements of Section 76.964 and 76.309(c)(3)(i)(B) of the rules for the first quarter of 1995 as well.

You request a waiver of Section 76.922(e)(1) of the rules that provides (1) "[a] system may adjust the residual component of its permitted rate for a tier to reflect changes in the number of channels offered on a quarterly basis," and (2) the rate adjustment is to be "based on any changes in the number of regulated channels that occurred from the end of the last quarter for which an adjustment was previously made through the end of the quarter that has most recently closed preceding the filing of FCC Form 1210. . ."

As you indicate, Section 76.922(e)(1) allows regulated cable operators to adjust rates to reflect channel additions no earlier than the calendar quarter following the quarter in which the cost is incurred. You suggest that this would be inconsistent with the Commission's stated policy of permitting operators to begin adding channels as of January 1, 1995. The Commission indicated in the Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking in MM Docket Nos. 92-266 and 93-215, FCC 94-286 (released November 18, 1994) (*"Going Forward Order"*), that operators would be allowed to add new programming channels under our new "going forward" rules expeditiously. We believe that a waiver of Section 76.922(e)(1) quarterly adjustment limitation during the first quarter of 1995 is appropriate because the timing of the *Going Forward Order* made it difficult for some operators to add channels before the close of 1994. Furthermore, the quarterly rate adjustment rule was primarily a rule to reduce administrative burdens of continuous rate filings. As such, a waiver would best balance the subscribers' interests in receiving additional services at reasonable rates and the operators' need to recover the costs of adding new channels. Therefore, Cox will be allowed to add new programming channels pursuant to the new "going forward" rules and begin charging for the channels at any time thereafter during the first quarter of 1995. This waiver of the quarter rate adjustment waiting period is being granted as transitional relief and therefore will be applicable only to new channels added in the first quarter of 1995. This is a blanket waiver which is applicable to all similarly situated operators seeking to add cable programming services as described above.

You also request a waiver of the Commission's notice requirements in conjunction with the quarter rate adjustment limitation waiver. Pursuant to Sections 76.964 and 76.309(c)(3)(i)(B) of the Commission's rules, cable operators are required to provide subscribers and local franchising authorities with thirty days written notice of any rate or service change. You request a waiver of the Commission's notice requirements to allow Cox to provide initial notice of these service and rate adjustments to subscribers using alternative means, including newspaper and on-screen announcements in lieu of the thirty days written notice required by our rules. In support of your request you cite our letter of November 30, 1994 regarding The Disney Channel (the "Disney Letter").[1]

Our rules regarding subscriber notice of rate or service changes are intended in part to provide subscribers ample time to react and, if they so elect, to cancel any service they no longer wish to receive due to the rate or service change. We believe, however, that, under the limited circumstances described in your letter and given the transitional nature of your request and similar requests we have received, a waiver of our notice provisions is appropriate. We note that adding a channel to a CPST (or to a basic service tier where an operator offers only one tier of regulated cable service) on January 1, 1995, as provided in our *Going Forward Order*, and compliance with the referenced notice regulations, is not feasible in all cases given that the *Going Forward Order* was released on November 18, 1994. We also believe that the conditions to this waiver described below will adequately protect subscribers from undue harm.

We therefore waive our notice requirements contained in Sections 76.964 and 76.309(c)(3)(i)(B) of the Commission's rules with respect to the addition new programming channels to CPSTs in the first quarter of 1995. We limit this waiver, however, to the condition that notice be provided through alternative means substantially similar to those described in the Disney Letter, which incorporates by reference conditions in the November 23 letter from Disney to Cable Services Bureau,[2] and no less likely to come to the attention of a substantial number of viewers, namely week-

[1] *See* In re The Disney Channel, DA 94-1346 (Cable Services Bureau, adopted November 30, 1994).

[2] Letter from Frederick Kuperberg, Senior Vice President, Business and Legal Affairs, the Disney Channel, to Meredith J. Jones, Chief, Cable Services Bureau (November 23, 1994). A copy of this letter is attached for your review. Subsequent to our issuance of the Disney letter, the Bureau issued a blanket waiver for the addition of new channels before January 1, 1995, so long as the terms and conditions set forth in the Disney letter were met. *See* In re E! Entertainment Television, Inc., DA 94-1474 (Cable Services Bureau, adopted December 13, 1994).

ly newspaper advertisements in a major newspaper or newspapers with circulation throughout each affected cable community, on-screen messages on a daily basis, notifying local franchising authorities as soon as practicable, and written notice to subscribers beginning no later than 15 days after the channel addition.[3] Our notification rules are intended in part to provide subscribers with the opportunity to cancel any service they no longer wish to receive due to a rate or service change. Therefore as a further condition of the waiver, we require that if any subscriber cancels his or her subscription to the relevant CPST within thirty days after the date of the first bill reflecting the increased rate, the operator must refund to that subscriber the incremental dollar amount attributable to the addition of new programming channel(s) to the CPST added pursuant to this waiver through the date the subscriber cancels the CPST. This waiver applies to new channels added to a system's offerings, as well as to channels previously offered on the system on an a la carte basis. This is a blanket waiver which is applicable to all similarly situated operators seeking to add cable programming services as described above.

Sincerely,

Meredith J. Jones
Chief, Cable Services Bureau

[3] We note that we have previously granted waivers of our notice provisions in transitional situations where the cable operator provides similar substitute advance notice. *See, e.g.*, In re fX (released May 9, 1994) (providing limited waiver of notice provisions in 47 C.F.R. §§ 76.964 and 76.309(c)(3) as applied to the launch of the new fX channel).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 7606
Tariff F.C.C. No. 7

ORDER

Adopted: December 6, 1994; Released: December 7, 1994

By the Acting Chief, Tariff Division, Common Carrier Bureau:

1. On October 12, 1994, AT&T Corp. (AT&T) filed Transmittal No. 7606 to increase the monthly rates for its full-time SKYNET International Voice Grade Earth Segment Service (SIESS). SIESS is used to provide international switched and private line services. Transmittal 7606 is scheduled to take effect on December 11, 1994.

2. On October 27, 1994, IDB WorldCom Services, Inc. (IDB WorldCom) filed a petition to reject, or suspend and investigate, Transmittal 7606. AT&T replied on November 7, 1994.

3. In its petition, IDB WorldCom claims that AT&T's cost support does not provide sufficiently detailed cost support materials to comply with the requirements in Section 61.38(b) of the Commission's Rules.[1] It argues that AT&T's claim that SIESS rates must increase to cover the increased costs of investments, maintenance, labor and marketing in the face of decreased demand for an analog service is not logical.[2] IDB WorldCom also argues that AT&T's demand estimate is flawed, particularly inasmuch as the estimate appears to be based in part on a prediction that IDB would use only 96 analog circuits, even though it told AT&T it expected to use 150 - 200 circuits in 1994. Moreover, it claims, the rate increase warrants suspension under Section 201(b) to determine whether the increase, which would double AT&T's current rates and cause a threefold increase within a two year period, is unreasonable. Finally, it argues the rate increase will disproportionately harm users of international analog services, and might be used by AT&T to subsidize the analog circuits that AT&T uses.[3]

4. AT&T replies that the costs it incurs per analog circuit increase as demand for analog services decreases, so that its current rates do not recover costs.[4] AT&T also counters that it used the standard method of using historical trends to evaluate anticipated customer usage to forecast demand. It claims IDB indicated to AT&T that its SIESS usage would decline at the beginning of December 1994 as it turns up alternative service on submarine cable systems. Moreover, AT&T claims, its rate increase is not excessive, and will likely yield at most only a $4,000 annual profit given the rapid attrition of customers from this analog service. Finally, AT&T contends that its rates are applied uniformly, and that the associated costs are proportionately allocated to all users, including AT&T.[5]

5. Responding to a request from the Tariff Division, AT&T filed additional cost support for Transmittal 7606 on November 16, 1994. In its filing, AT&T further described its demand forecast methodology. It also provided disaggregated cost data for maintenance, depreciation, marketing and other expenses related to SIESS provisioning.

6. The Tariff Division has reviewed AT&T Communications Transmittal No. 7606 and the related pleadings. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

7. Accordingly, IT IS ORDERED that the petition to reject or suspend and investigate AT&T Communications Tariff F.C.C. No. 7, Transmittal No. 7606, filed by IDB WorldCom Services, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Acting Chief, Tariff Division
Common Carrier Bureau

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[1] IDB WorldCom Petition at 3-5.
[2] *Id.* at 4, *citing* AT&T D&J at 1.
[3] *Id.* at 5-7, *citing* Ameritech Operating Companies, Tariff F.C.C. No. 2, Transmittal No. 518, 6 FCC Rcd 3716 (Com. Car. Bur. 1992) (suspending high rates pending investigation).
[4] AT&T Reply at 3-4.
[5] *Id.* at 5-7.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 94-139

In the Matter of

AT&T Communications Transmittal No. 7848
F.C.C. Tariff Nos. 1 and 13

MEMORANDUM OPINION AND ORDER

Adopted: December 14, 1994; Released: December 14, 1994

By the Acting Chief, Tariff Division:

1. On December 2, 1994, AT&T Communications (AT&T) filed Transmittal No. 7848 to revise its Tariff F.C.C. Nos. 1 and 13. These revisions would increase dial station rates for calls within the U.S. mainland, from the U.S. mainland to Hawaii, Alaska, Puerto Rico and the U.S. Virgin Islands, from Puerto Rico and the U.S. Virgin Islands to the U.S. mainland, and between Puerto Rico and the U.S. Virgin Islands. Transmittal No. 7848 is scheduled to take effect on December 16, 1994.

2. On August 1, 1994, AT&T filed its Transmittal 7322 to increase certain mileage rates for customer dialed calling card calls. In that filing, AT&T included adjustments to its price cap indices (PCIs) for each basket of service rates to account for exogenous increases in its costs. Included in the costs for which AT&T sought exogenous treatment were amounts associated with Statement of Financial Accounting Standard 112 (SFAS-112), "Standards for Employers' Accounting for Postemployment Benefits."

3. The Common Carrier Bureau suspended AT&T's Transmittal 7322 for one day and initiated an investigation of those rates.[1] That Order directed AT&T to include a statement in all subsequent transmittals which revise rates to indicate whether the price change is predicated upon the exogenous cost claim set forth in Transmittal No. 7322.[2] In the instant filing, AT&T states that the rate increases included in Transmittal 7848 bring rates to the maximum permitted by the PCI increases created in Transmittal 7322.

4. This transmittal raises the same issues as Transmittal 7322. Therefore, Transmittal 7848 is suspended for one day and will be subject to the investigation initiated in the *SFAS-112 Suspension Order*. These rates will also be subject to an accounting order to facilitate any refunds that may later prove necessary.

5. Accordingly, IT IS ORDERED that, AT&T Communications SHALL FILE tariff revisions on December 15, 1994, to be effective on same day's notice, in order to advance the effective date of the above-referenced transmittals and any subsequent revisions.

6. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the revised rates set forth in AT&T Communications Tariff F.C.C. Nos. 1 and 13, Transmittal No. 7848 ARE SUSPENDED for one day from the December 15, 1994 effective date and an investigation of those rates IS INSTITUTED.

7. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, AT&T Communications SHALL KEEP ACCURATE ACCOUNT of all amounts received that are associated with the rates that are the subject of this investigation.

8. IT IS FURTHER ORDERED that, for these purposes, we waive Sections 61.56, 61.58 and 61.59 of the Commission's rules, 47 C.F.R. §§ 61.56, 61.58 and 61.59. AT&T Communications should cite the "DA" number of the instant Order as the authority for this filing.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Acting Chief, Tariff Division
Common Carrier Bureau

[1] AT&T Communications Tariff F.C.C. No. 1, Transmittal No. 7322, CC Docket No. 94-139, *Memorandum Opinion and Order Suspending Rates*, DA 94-1327 (Com. Car. Bur. released Nov. 28, 1994) (*SFAS-112 Suspension Order*).

[2] *Id.* at 5.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications	Transmittal
Revisions to Tariff	Nos. 7698, 7859
F.C.C. No. 1	

ORDER

Adopted: December 15, 1994; Released: December 15, 1994

By the Acting Chief, Tariff Division, Common Carrier Bureau:

1. On November 3, 1994, AT&T Communications (AT&T) filed Transmittal No. 7698, to introduce 500 service. This service would enable calling parties to dial a single telephone number and reach the 500 service subscriber at different locations.[1] AT&T also plans to establish a promotion for 500 service, to run until February 28, 1995.[2] Transmittal 7698 was originally filed on 27 days' notice, with a scheduled effective date of November 30, 1994. It is now scheduled to take effect on December 18, 1994, on 45 days' notice.

2. On November 10, 1994, MCI Telecommunications Corp. (MCI) filed a petition to reject or suspend and investigate Transmittal 7698. MCI maintains that 500 service is a new service within the meaning of the Commission's price cap rules. As a result, says MCI, Transmittal 7698 violates Section 61.58(c)(5) of the Commission's Rules, 47 C.F.R. § 61.58(c)(5), requiring new services to be filed on at least 45 days' notice.[3] MCI asserts that AT&T requires a waiver of the Commission's Rules to establish its 500 service promotion.[4] MCI also contends that AT&T has not met the cost support requirements for price cap new services, as specified in Section 61.49(g)(1) of the Commission's Rules, 47 C.F.R. § 61.49(g)(1).[5] Finally, MCI observes that AT&T cannot provide 500 service until a local exchange carrier (LEC) starts to provide 500 access service. MCI is not aware of any LEC with a 500 access service tariff in effect, and notes that several LECs have sought waivers of the Commission's rules to establish a new rate element for 500 access service.[6]

3. AT&T replied on November 18, 1994. AT&T denies that it needs a waiver to file Transmittal 7698 on less than 45 days' notice. AT&T argues that Section 61.42(c)(9) of the Commission's Rules, 47 C.F.R. § 61.42(c)(9), excludes from price cap regulation "[s]ervices removed from price cap regulation pursuant to the Report and Order in Docket No. 90-132."[7] AT&T notes that streamlined services do not need cost support.[8] AT&T also maintains that business services were streamlined because of the growth and intensity of competition in the business services market.[9]

4. AT&T argues that 500 service should be streamlined because it is primarily designed for and particularly useful to business customers.[10] AT&T observes that its Maritime Mobile and Optimum services were filed on 14 days' notice, without cost support, and without first obtaining a waiver.[11] AT&T also argues that the Commission has authority under Section 61.42(c)(17) of its Rules, 47 C.F.R. § 61.42(c)(17), to exclude from price cap baskets "such other services as the Commission may specify." According to AT&T, the Commission should specify 500 service as a service excluded from price cap baskets, because 500 service customers will primarily be business customers and because 500 service is likely to be competitive. AT&T notes that over 200 service providers have been assigned 500 NXX codes.[12]

5. AT&T denies that LEC 500 access service will be unavailable when its tariff is scheduled to take effect. AT&T maintains that Nevada Bell and some members of the National Exchange Carrier Association (NECA) have made 500 service available under their existing tariffs.[13] AT&T observes that NYNEX has a tariff filing for 500 access service scheduled to take effect on November 30, 1994.[14] AT&T also asserts that other large LECs will be technically capable of providing 500 access service by the time its tariff takes effect.[15] AT&T states that its tariff limits 500 service to areas where LEC 500 access service in available.[16] Finally, AT&T assumes that the Commission would likely waive the notice requirements of Part 61, to expedite the effectiveness of the LECs' 500 access tariffs.[17]

6. As noted above, AT&T deferred the effective date of Transmittal 7698 to December 18, 1994. In addition, on December 6, 1994, AT&T submitted cost support which it claims meets the requirements of Section 61.49(g) of the Commission's Rules.[18] We have reviewed the tariff transmittal filed by AT&T, as well as all associated plead-

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[1] AT&T Transmittal No. 7698, Section 6.28.1; AT&T Reply at 1.

[2] AT&T Transmittal No. 7698, Section 8.1.1.707, Original Page 199.1.715.

[3] MCI Petition at 2-3.

[4] *Id.* at 3 n.3.

[5] *Id.* at 3-4.

[6] *Id.* at 4-5.

[7] AT&T Reply at 4.

[8] *Id.* at 5 n.4, *citing* Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, 6 FCC Rcd 5880, 5894 (1991) (*IXC Rulemaking);* Section 61.49(g)(1) of the Commission's Rules, 47 C.F.R. § 61.49(g)(1) (cost support required only for new services that will later be included in a price cap basket.).

[9] *Id.* at 5, *citing IXC Rulemaking,* 6 FCC Rcd at 5894.

[10] *Id.* at 5-7 and App. A (Aff. of Kathleen Farrell) ("AT&T plans to market 500 Personal Number Service to all interested customers, both business and residential, but reasonably anticipates that ... the most significant usage will be generated by business customers.").

[11] *Id.* at 7 n.7.

[12] *Id.* at 7-8.

[13] *Id.* at 8.

[14] *Id.* at 9 n.9.

[15] *Id.* at 8 and App. B (Aff. of Jon Schrader).

[16] *Id.* at 8-9, *citing* AT&T Transmittal No. 7698, Section 6.28.2.C.

[17] *Id.* at 9.

[18] *See* Letter from Charles Griffin, AT&T, to Secretary, FCC (*December 6 Letter).* Also on December 6, AT&T filed Transmittal No. 7859 to make certain corrections to the tariff language submitted under Transmittal No. 7698.

ings and filings. We conclude that AT&T's tariff is not patently unlawful so as to warrant rejection, and that an investigation is not warranted at this time.[19]

7. Accordingly, IT IS ORDERED that the petition for rejection filed by MCI Telecommunications Corporation, against the transmittal captioned above, IS DENIED.

8. IT IS FURTHER ORDERED that AT&T Communications MAY FILE tariff revisions, on not less than one day's notice, in order to advance the effective date of Transmittal Nos. 7698 and 7859. For this purpose, we waive Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59. AT&T Communications should cite the "DA" number of this Order as the authority for this filing.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Acting Chief, Tariff Division
Common Carrier Bureau

[19] The Bureau released an Order on November 30, 1994, granting waiver petitions associated with 500 access service filed by 12 LECs. Ameritech Operating Companies, *et al.*, Petitions for Waiver of Sections 69.4(b) and 69.106 of Part 69 of the Commission's Rules, DA 94-1350 (Com. Car. Bur., released Nov. 30, 1994). In that Order, the Bureau did not grant any waivers of the Commission's notice requirements, and there was no discussion of permitting LECs to file 500 access tariffs on less than statutory notice.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Emergency Petition and Request for Stay
of Personal Communications Service
Auctions filed by Data Link One, Inc.

ORDER

Adopted: December 22, 1994; Released: December 23, 1994

By the Chief, Wireless Telecommunications Bureau

1. On December 15, 1994, Data Link One, Inc. ("Data Link") filed an "Emergency Petition and Request for Stay" of the on-going broadband personal communications service (PCS) auction. For the reasons stated below, Data Link's petition is denied.

2. Data Link contends that the Commission led potential bidders to believe that the upfront payment required for each market, which is calculated on a per megahertz per population basis, would also be the minimum opening bid for the market in question. It notes that the Commission has accepted bids in some markets in amounts less than the required upfront payment for those markets. Data Link argues that had it known that lower opening bids were acceptable, it would have submitted upfront payments sufficient to bid in a whole range of markets, rather than only in Market 51, American Samoa.

3. Therefore, Data Link argues that the Commission should permit bidders in the current auction a three-day period in which to amend their short-form applications (FCC Form 175) to specify additional markets and to tender the minimum upfront payment for those markets. In addition, Data Link asks for a one-week stay of the auction to allow the Commission time to rule on its emergency petition and implement the requested procedures.

4. Data Link's petition is denied because it has not shown that it has any likelihood of succeeding on the merits. *See Virginia Petroleum Jobber's Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958). There is no basis for Data Link's contention that the Commission led applicants to believe that the required opening bid for a particular market would be equal to or more than the minimum upfront payment. Indeed, the Public Notice referenced by Data Link merely lists the amounts of the upfront payments required to become eligible to bid in each market, specifies the formula used to derive those figures, and explains how the total upfront payment amount tendered relates to the maximum number of licenses on which the applicant may bid in any single round. It nowhere implies, either directly or indirectly, that such upfront payment would be tied in any manner to the opening bids. Moreover, while Section 1.2104(d) of the Commission's rules, 47 C.F.R. §1.2104(d), gives the Commission the discretion to establish suggested minimum opening bids on a service-specific basis, the rule does not require or suggest that such opening bids be set at any particular amount. And, in any event, the Commission did not exercise its discretion to establish minimum starting bids in the current broadband PCS auction.

5. Data Link also has failed to satisfy the other requirements for a stay set forth in *Virginia Jobbers*. Data Link's argument that it will be irreparably harmed is speculative because there is no way to anticipate whether the bids in particular markets will remain below the upfront payments as the auction progresses. Implicit in Data Link's argument is that it wants to participate in those markets because the bid prices currently are lower than it expected they would be. Further, grant of Data Link's request would result in substantial harm to other applicants who have based their bidding strategy on the current universe of eligible bidders. Opening up markets to new applicants at this juncture would cause significant prejudice to these other bidders. Moreover, it would be unfair to parties who, because of an inability to obtain financing, did not submit upfront payments to participate in the auction at all. Had these potential applicants thought our deadlines were flexible, they may have continued to seek investors beyond the cut-off date. Finally, grant of Data Link's petition would harm the public interest by undermining the fairness and integrity of the auction process.

6. Data Link's interpretation of the broadband PCS bidding procedures, which procedures are clearly set forth in the Public Notice, the Bidder's Information Package and the Commission's rules, is baseless. Data Link has cited to nothing, and we find nothing, in these materials that would lead a reasonable bidder to believe that the upfront payment for each market would also be the minimum opening bid.

7. Accordingly, IT IS ORDERED that the Emergency Petition and Request for Stay of Personal Communications Service Auctions filed by Data Link One, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Regina M. Keeney
Chief, Wireless Telecommunications Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI CABLEVISION OF
CENTRAL INDIANA, INC.

Appeal of Local
Rate Order of City of
Anderson, IN

ORDER

Adopted: December 28, 1994; Released: December 28, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. TCI Cablevision of Central Indiana, Inc. ("TCI"), the franchisee in the above matter, filed on May 9, 1994 an Appeal of Local Cable Rate Order adopted on April 7, 1994 by its local franchising authority, the City of Anderson, Indiana ("the City").[1] The Rate Order establishes a new regulated rate schedule for TCI's basic service tier rates and associated equipment.[2] Specifically, the City's Rate Order requires TCI to implement certain rate reductions and to issue refunds to subscribers, dating back to September 1, 1993.

2. In its review of TCI's Form 393, the City approved TCI's maximum permitted rate for its basic service tier, but ordered TCI to keep its rates for certain equipment and installations at the current levels, rather than at the higher, maximum permitted levels. TCI argues that because of this misapplication of the Commission's rate regulations, the City has improperly reduced TCI's regulated revenues by setting its rates for certain equipment and installations below the levels permitted under the benchmark regime and has imposed a refund liability that is greater than the level allowed under our rules. TCI argues that it should be permitted to offset its refund liability for its basic service tier rate with its undercharges for equipment and installation rates.

II. DISCUSSION

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[3] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[4] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[5] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[6]

4. FCC Form 393 is the official form used by regulators to determine whether an operator's regulated rates for programming, equipment and installations were reasonable during the time period from September 1, 1993 until May 14, 1994.[7] Form 393 is divided into three separate, but interrelated parts. In Part II, the operator calculates its maximum permitted programming rates, while in Part III, the operator calculates its maximum permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the period of review.

5. The operator's maximum permitted rates are derived by completing Parts II and III of the Form 393, pursuant to which the operator calculates the actual aggregate revenues collected by the operator for regulated programming, equipment and installation, as of the initial date of regulation ("current rate") or as of September 30, 1992.[8] After calculating actual aggregate revenues, the operator converts those revenues to a per-channel rate, and then compares the per-channel figures to the applicable benchmark rate. If an operator's current per-channel rate is below the applicable benchmark rate, then the operator's rate is deemed reasonable, but it must remain at its current level. If its current per-channel rate exceeds the benchmark rate, the operator must then compare its September 30, 1992 per-channel rate to the applicable benchmark rate. If its September 30, 1992 per-channel rate is above the benchmark

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[1] The City of Anderson has not filed an opposition to TCI's appeal and the Commission's deadline for receiving such a filing has passed.

[2] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[3] *See* 47 C.F.R. § 76.944.

[4] *See Report and Order and Further Notice of Proposed Rulemaking in MM Docket 92-266*, 8 FCC Rcd 5631, 5731 (released May 3, 1993) (*"Report and Order"*); *Third Order on Reconsideration in MM Docket 92-266*, FCC 94-40, slip op. at ¶ 81 (released March 30, 1994) (*"Third Recon. Order"*).

[5] *Id.*

[6] *Id.*

[7] To the extent that an operator has sought to take advantage of the refund deferral period available under the *Second Order on Reconsideration, Fourth Report an Order, and Fifth Notice of Proposed Rulemaking in MM Docket 92-266*, 9 FCC Rcd 4119, 4183-4185 (1994), the maximum permitted rates determined under Form 393 may also apply from May 15, 1994 until the date that the operator implemented its new rates, as determined under the Form 1200 series.

[8] An operator must calculate its rate in effect on September 30, 1992, only if its current rate is above the benchmark rate. If an operator's current rate is at or below the benchmark rate, it is not required to calculate its September 30, 1992 per-channel rate.

rate, it must reduce this rate to the benchmark rate or by 10%, whichever reduction is less. The adjusted rate will be its maximum permitted rate for programming. Maximum permitted rates for equipment and installation are based on actual cost and are calculated in Part III of the Form 393. Equipment rates are derived from capital and maintenance costs per unit of equipment. Installation rates are derived from calculation of an hourly service charge and application of that charge to different types of installations. Under our regulations, the maximum permitted rates are deemed to be reasonable, as required by the 1992 Cable Act.[9] Requiring cable operators to set all or some of their rates for programming, equipment or installation below their maximum permitted levels would force them to charge rates at levels below those specifically allowed under our rules.[10]

6. If a franchising authority does not dispute the bases for the figures presented in a cable operator's Form 393 or has not discovered any mathematical errors in the form, the franchising authority should then approve the operator's maximum permitted rates, as derived by the form. A franchising authority should not require the operator to set a particular rate for programming, equipment or installations at any rate less than its maximum permitted rate, even if its current or actual rate is below its maximum permitted rate. Instead, the franchising authority should allow the operator to charge up to its maximum permitted rates, as derived by Form 393.[11] In this proceeding, the City did not dispute either the validity of the figures used in TCI's Form 393 or the accuracy of the calculations in the form. Therefore, the City should allow TCI to charge its maximum permitted rates, as derived by the Form 393.

7. After setting the various regulated rates that an operator is permitted to charge on a prospective basis, a franchising authority should then determine if the operator is liable for any subscriber refunds. A refund liability can be imposed when an operator's actual charges exceed maximum permitted levels during the applicable period of review.[12] If an operator's aggregate revenues computed from its actual rates exceeded its revenues computed from its permitted rates during the period of review, the operator must refund the difference to subscribers.[13] If the operator's aggregate revenues computed from its permitted rates exceeded its aggregate revenues computed from its actual rates, the operator will not be required to issue any refunds for that period of review. In this proceeding, any refunds to be paid by TCI should be calculated based on this method.

8. While the Commission will sustain the decisions of franchising authorities if there is a reasonable basis for doing so, we expect franchising authorities to adhere to the mathematical principles underlying the benchmark methodology, particularly when calculating an operator's refund liability.[14] For instance, in this case, the City may not order TCI to set its equipment and installation rates below maximum permitted levels. Further, the City must offset or reduce any refunds it may order by the difference between the actual equipment and installation rates that TCI charged and the maximum permitted rates that it could have charged during the applicable period of review.[15] According to TCI's uncontested submission, the City has directed TCI to charge less than its maximum permitted levels for certain components of its regulated equipment and installation service and to issue refunds without regard to the fact that some rates are below maximum permitted levels. We are remanding this case to the City so that it can reconsider its ruling in a manner consistent with our findings.[16]

9. Accordingly, IT IS ORDERED that TCI Cablevision's appeal of The City of Anderson's local Rate Order, regarding the issue of TCI Cablevision's permitted charges for certain equipment and installation provided by TCI and related refunds IS REMANDED to the local franchising authority for resolution in accordance with the terms of this Order.

10. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[9] *See* Communications Act, § 623(b), 47 U.S.C. § 543(b).

[10] If a franchising authority required an operator to set its rates for equipment and installations below their maximum permitted levels, the operator could, in effect, be forced to provide equipment and installations at levels below actual cost.

[11] An operator is not required, however, to raise its rates to the maximum permitted level. An operator may voluntarily choose to charge less than the maximum permitted rate.

[12] *See* 47 C.F.R. § 76.942.

[13] *See Third Recon. Order* at ¶ ¶ 103-104 ("Although maximum permitted rates are always determined on an unbundled basis, *i.e.*, separately for program service and equipment, refund liability may stem from bundled rates. We conclude that the refund liability should be calculated based on the difference between old bundled rates and the sum of the new unbundled program service charge(s) and the new unbundled equipment charge(s).").

[14] *See Report and Order* at 5731; *Third Recon. Order* at ¶ 81.

[15] *See Third Recon. Order* at ¶ ¶ 103-104.

[16] *See TCI Cablevision of North Central Kentucky, Inc.* (Mount Washington, KY), DA 94-1479 (released December 14, 1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI CABLEVISION OF
COLORADO, INC.

Appeal of Local
Rate Order of City of
Boulder, CO

ORDER

Adopted: December 28, 1994; Released: December 28, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. TCI Cablevision of Colorado, Inc. ("TCI"), the franchisee in the above matter, filed on July 6, 1994 an Appeal of Local Cable Rate Order adopted on June 6, 1994 by its local franchising authority, the City of Boulder, Colorado ("the City"). The City opposes TCI's appeal.[1] The Rate Order establishes a new regulated rate schedule for TCI's basic service tier rates and associated equipment.[2] Specifically, the City's Rate Order requires TCI to implement certain rate reductions and to issue refunds to subscribers, dating back to September 1, 1993.

2. In its review of TCI's Form 393, the City reduced TCI's rates for its basic service tier to the maximum permitted rate, but ordered TCI to keep its rates for equipment and installation at the current levels, rather than at the higher, maximum permitted levels.[3] TCI argues that because of this misapplication of the Commission's rate regulations, the City has improperly reduced TCI's regulated revenues by setting its rates for equipment and installation below the levels permitted under the benchmark regime and has imposed a refund liability that is greater than the level allowed under our rules. TCI argues that it should be permitted to offset its refund liability for its basic service tier rate with its undercharges for equipment and installation rates. TCI also contends that the City improperly established a 7.0% interest rate on the refunds required by its local rate order instead of the applicable rate for IRS tax refunds. Finally, TCI contends that the City improperly regulated rates for certain types of equipment, A/B switches and equipment to receive Digital Music Express ("DMX") and FM radio services from TCI, which TCI argues, are not subject to regulation. We consider each of these issues in turn.

II. DISCUSSION

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[4] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[5] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[6] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[7]

A. Refund Offsets

4. FCC Form 393 is the official form used by regulators to determine whether an operator's regulated rates for programming, equipment and installation were reasonable during the time period from September 1, 1993 until May 14, 1994.[8] Form 393 is divided into three separate, but interrelated parts. In Part II, the operator calculates its maximum permitted programming rates, while in Part III, the operator calculates its maximum permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that

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[1] The City filed its opposition on August 12, 1994, well past the deadline under our rules for such a filing. The City contends that TCI did not file its original appeal with either the City Attorney's Office or the City Clerk, the only two City officials that can accept service of process under the City Charter. TCI does not dispute the City's contention, nor has it filed a motion to strike the City's opposition. In order to have a more complete record, we therefore accept the City's opposition.

[2] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[3] TCI's current rate of $10.14 for its basic service tier was reduced to the maximum permitted rate of $9.28. On the Cover Sheet (Part I) of its Form 393, TCI's actual rates for all regulated equipment and installation are below the maximum permitted rates, except that the charge for changing tiers is the same for both rates and the actual rate for converter boxes (type 2) is greater than the maximum permitted rate. Other than the rates for its basic service tier and converter boxes (type 2), which were reduced to their maximum permitted rates, the City set TCI's rates for equipment and installation at the lower, actual rate rather than the higher, maximum permitted rate.

[4] *See* 47 C.F.R. § 76.944.

[5] *See Report and Order and Further Notice of Proposed Rulemaking in MM Docket 92-266*, 8 FCC Rcd 5631, 5731 (released May 3, 1993) (*"Report and Order"*); *Third Order on Reconsideration in MM Docket 92-266*, FCC 94-40, slip op. at ¶ 81 (released March 30, 1994) (*"Third Recon. Order"*).

[6] *Id.*

[7] *Id.*

[8] To the extent that an operator has sought to take advantage of the refund deferral period available under the *Second Order on Reconsideration, Fourth Report an Order, and Fifth Notice of Proposed Rulemaking in MM Docket 92-266*, 9 FCC Rcd 4119, 4183-4185 (1994), the maximum permitted rates determined under Form 393 may also apply from May 15, 1994 until the date that the operator implemented its new rates, as determined under the Form 1200 series.

have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the period of review.

5. The operator's maximum permitted rates are derived by completing Parts II and III of the Form 393, pursuant to which the operator calculates the actual aggregate revenues collected by the operator for regulated programming, equipment and installation, as of the initial date of regulation ("current rate") or as of September 30, 1992.[9] After calculating actual aggregate revenues, the operator converts those revenues to a per-channel rate, and then compares the per-channel figures to the applicable benchmark rate. If an operator's current per-channel rate is below the applicable benchmark rate, then the operator's rate is deemed reasonable, but it must remain at its current level. If its current per-channel rate exceeds the benchmark rate, the operator must then compare its September 30, 1992 per-channel rate to the applicable benchmark rate. If its September 30, 1992 per-channel rate is above the benchmark rate, it must reduce this rate to the benchmark rate or by 10%, whichever reduction is less. The adjusted rate will be its maximum permitted rate for programming. Maximum permitted rates for equipment and installation are based on actual cost and are calculated in Part III of the Form 393. Equipment rates are derived from capital and maintenance costs per unit of equipment. Installation rates are derived from the calculation of a hourly service charge and application of that charge to different types of installations. Under our regulations, the maximum permitted rates are deemed to be reasonable, as required by the 1992 Cable Act.[10] Requiring cable operators to set all or some of their rates for programming, equipment or installation below their maximum permitted levels would force them to charge rates at levels below those specifically allowed under our rules.[11]

6. If a franchising authority does not dispute the bases for the figures presented in a cable operator's Form 393 or has not discovered any mathematical errors in the form, the franchising authority should then approve the operator's maximum permitted rates, as derived by the form. A franchising authority should not require the operator to set a particular rate for programming, equipment or installation at any rate less than its maximum permitted rate, even if its current or actual rate is below its maximum permitted rate. Instead, the franchising authority should allow the operator to charge up to its maximum permitted rates, as derived by Form 393.[12] In this proceeding, the City did not dispute either the validity of the figures used in TCI's Form 393 or the accuracy of the calculations in the form. Therefore, the City should allow TCI to charge its maximum permitted rates, as derived by the Form 393.

7. After setting the various regulated rates that an operator is permitted to charge on a prospective basis, a franchising authority should then determine if the operator is liable for any subscriber refunds. A refund liability can be imposed when an operator's actual charges exceed maximum permitted levels during the applicable period of review.[13] If an operator's aggregate revenues computed from its actual rates exceeded its revenues computed from its permitted rates during the period of review, the operator must refund the difference to subscribers.[14] If the operator's aggregate revenues computed from its permitted rates exceeded its aggregate revenues computed from its actual rates, the operator will not be required to issue any refunds for that period of review. In this proceeding, any refunds to be paid by TCI should be calculated based on this method.

8. While the Commission will sustain the decisions of franchising authorities if there is a reasonable basis for doing so, we expect franchising authorities to adhere to the mathematical principles underlying the benchmark methodology, particularly when calculating an operator's refund liability.[15] For instance, in this case, the City may not order TCI to set its equipment and installation rates below maximum permitted levels. Further, the City must offset or reduce any refunds it may order by the difference between the actual equipment and installation rates that TCI charged and the maximum permitted rates that it could have charged during the applicable period of review.[16] According to TCI's uncontested submission, the City has directed TCI to charge less than its maximum permitted levels for certain components of its regulated service and to issue refunds without regard to the fact that some rates are below maximum permitted levels. We are remanding this case to the City so that it can reconsider its ruling in a manner consistent with our findings.[17]

B. Interest Rate for Refunds

9. TCI next contends that the City incorrectly established a 7% interest rate on the refunds required by its local rate order. The 7% rate represents the IRS overpayment rate. TCI argues that our rules mandate the applicable interest rate in such circumstances is the IRS rate for tax refunds, which in this instance is 6.0%. We agree with TCI. Our rules explicitly state that interest on subscriber refunds shall be computed at the applicable published IRS rate for tax refunds and additional tax payments.[18] In this instance, as the parties agree, the interest rate for tax refunds is 6.0%. This issue is therefore remanded to the City for further proceedings consistent with this order.

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[9] An operator must calculate its rate in effect on September 30, 1992, only if its current rate is above the benchmark rate. If an operator's current rate is at or below the benchmark rate, it is not required to calculate its September 30, 1992 per-channel rate.

[10] *See* Communications Act, § 623(b), 47 U.S.C. § 543(b).

[11] If a franchising authority required an operator to set its rates for equipment and installation below their maximum permitted levels, the operator could, in effect, be forced to provide equipment and installation at levels below actual cost.

[12] An operator is not required, however, to raise its rates to the maximum permitted level. An operator may voluntarily choose to charge less than the maximum permitted rate.

[13] *See* 47 C.F.R. § 76.942.

[14] *See Third Recon. Order* at ¶ ¶ 103-104 ("Although maximum permitted rates are always determined on an unbundled basis, *i.e.*, separately for program service and equipment, refund liability may stem from bundled rates. We conclude that the refund liability should be calculated based on the difference between old bundled rates and the sum of the new unbundled program service charge(s) and the new unbundled equipment charge(s).").

[15] *See Report and Order* at 5731; *Third Recon. Order* at ¶ 81.

[16] *See Third Recon. Order* at ¶ ¶ 103-104.

[17] *See TCI Cablevision of North Central Kentucky, Inc.* (Mount Washington, KY), DA 94-1479 (released December 14, 1994).

[18] *Report and Order*, 8 FCC Rcd at 5867 (citations omitted).

C. Nonregulated Equipment

10. TCI next contends that the City improperly set rates for certain equipment that TCI claims is nonregulated. Specifically, the City established rates for A/B switches and for equipment to receive DMX (a music service) and FM radio services provided by TCI through its cable system. TCI argues that this equipment is not properly subject to regulation by the City because it is used by subscribers only to receive off-the-air broadcast and radio signals and not used for the reception of its basic tier service.

11. Under the Commission's rules, rates for equipment that is used to receive basic service are regulated.[19] Regulated equipment ". . . consists of all the equipment in a subscriber's home that is used to receive the basic tier. . . . Such equipment shall include, but is not limited to: (1) converter boxes; (2) remote control units; (3) connections for additional television receivers; and (4) other cable home wiring."[20] This list of equipment is not intended to be an exhaustive list of all possible types of regulated equipment, but all such equipment, at a minimum, "must be used to receive the basic service tier." While the Commission has interpreted the phrase "equipment used to receive the basic service tier" broadly so as to comport with Congressional intent,[21] the switches and equipment at issue are simply not used to receive cable service. A/B switches are used by subscribers to switch off cable service and to receive, instead, off-the-air broadcast signals.[22] The switches are used only by cable subscribers who choose not to watch cable programming.[23] We note also that the switches are available from other sources. Not only are the A/B switches not "used to receive the basic service tier," but competitive sources for such switches exist through which subscribers may obtain them. The audio equipment is used only by cable subscribers who choose to receive music and radio services from their cable operator and not for reception of basic service. Accordingly, we conclude the City's determination that A/B switches and equipment used to receive audio services constitute regulated equipment is unreasonable and we remand the City's decision regarding the regulation of A/B switches and audio equipment for further proceedings consistent with this ruling.

III. ORDERING CLAUSE

12. Accordingly, IT IS ORDERED that TCI Cablevision's appeal of The City of Boulder's local Rate Order IS REMANDED to the local franchising authority for resolution in accordance with the terms of this Order.

13. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[19] 47 C.F.R. § 76.923(i).
[20] 47 C.F.R. § 76.932(a).
[21] *See Report and Order* at ¶ 283.
[22] *See SBC Media Ventures, Inc.* (Montgomery County, MD), DA 94-1251 (released November 22, 1994).
[23] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NEW ENGLAND CABLEVISION OF MASSACHUSETTS, INC., Petitioner,	Amesbury, MA 0049 Essex, MA 0153 Gloucester, MA 0136 Manchester, MA 0154 Merrimac, MA 0162 Rockport, MA 0137 Salisbury, MA 0165
v.	
COMMONWEALTH OF MASSACHUSETTS COMMUNITY ANTENNA TELEVISION COMMISSION, Respondent.	

Appeal of Enforcement of
Local Rate Orders

CONSOLIDATED ORDER

Adopted: December 28, 1994; Released: December 28, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. New England Cablevision of Massachusetts, Inc. ("NEC"), the franchisee in the above-referenced matter, filed Appeals of seven local rate orders on June 20, 1994, and Requests for Stays Pending Appeal on June 24, 1994.[1] The seven local rate orders were adopted on May 20, 1994 by NEC's franchising authority, the Commonwealth of Massachusetts Community Antenna Television Commission ("CATC"). The rate orders establish a new regulated rate schedule for NEC's basic service tier rates and associated equipment.[2] CATC opposes both the requests for stays and the appeals. In this Consolidated Order, we decide the merits of the appeals and therefore dismiss the Requests for Stay as moot.

2. Under our rules, rate orders adopted by local franchising authorities (LFAs) may be appealed to the Commission.[3] In ruling on appeals of local rate orders, the Commission does not conduct a *de novo* review, but instead will sustain the LFA's order as long as there is a reasonable basis for its decision.[4] The Commission will therefore reverse a LFA's decision only if it is determined that the LFA acted unreasonably in applying the Commission's rules in rendering its local rate order.[5] If the Commission reverses a LFA's decision, it will not substitute its own decision but will instead remand the issue to the LFA with instructions to resolve the case consistent with the Commission's decision on appeal.[6]

3. In this appeal, the issues NEC raises all involve calculations in FCC Form 393 and include allegations that: (1) CATC refused to allow NEC to correct errors made by NEC on its FCC Forms 393 which were first discovered and brought to CATC's attention only after the rate orders were issued; (2) CATC substituted line 301, an operator's average monthly costs for equipment and installation, for line 104, an operator's average monthly revenue for equipment and installation, on FCC Form 393; (3) CATC removed a New Hampshire community from the calculation of equipment basket costs before those costs were allocated to the Massachusetts communities in the affected system; and (4) CATC made errors by transposing numbers in Rockport's rate order. We consider each of these issues in turn.

II. Discussion

4. FCC Form 393 is the official form used by regulators to determine whether an operator's regulated rates for programming, equipment and installations were reasonable during the time period from September 1, 1993 until May 14, 1994.[7] Form 393 is divided into three separate, but interrelated parts. In Part II, the operator calculates its maximum permitted programming rates, while in Part III, the operator calculates its maximum permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the period of review.

5. The operator's maximum permitted rates are derived by completing Parts II and III of the Form 393, pursuant to which the operator calculates the actual aggregate rev-

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[1] The seven communities covered by NEC's appeals and requests for stays are: Amesbury, Essex, Gloucester, Manchester, Merrimac, Rockport and Salisbury.

[2] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, *as amended*, § 623(b), 47 U.S.C. § 543(b) (1993).

[3] 47 C.F.R. § 76.944 (1993).

[4] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5731 (1993) (*"Rate Order"*); Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket 92-266, and Buy-Through Prohibition, MM Docket No. 92-262, Third Order on Reconsideration, 9 FCC Rcd 4316, slip op., ¶ 81 (*"Third Reconsideration"*).

[5] *Id.*

[6] *Id.*

[7] To the extent that an operator has sought to take advantage of the refund deferral period available under the *Second Order on Reconsideration, Fourth Report an Order, and Fifth Notice of Proposed Rulemaking in MM Docket 92-266*, 9 FCC Rcd 4119, 4183-4185 (1994), the maximum permitted rates determined under Form 393 may also apply from May 15, 1994 until the date that the operator implemented its new rates, as determined under the Form 1200 series.

enues collected by the operator for regulated programming, equipment and installation, as of the initial date of regulation ("current rate") or as of September 30, 1992.[8] After calculating actual aggregate revenues, the operator converts those revenues to a per-channel rate, and then compares the per-channel figures to the applicable benchmark rate. If an operator's current per-channel rate is below the applicable benchmark rate, then the operator's rate is deemed reasonable, but it must remain at its current level. If its current per-channel rate exceeds the benchmark rate, the operator must then compare its September 30, 1992 per-channel rate to the applicable benchmark rate. If its September 30, 1992 per-channel rate is above the benchmark rate, it must reduce this rate to the benchmark rate or by 10%, whichever reduction is less. The adjusted rate will be its maximum permitted rate for programming. Maximum permitted rates for equipment and installation are based on actual cost and are calculated in Part III of the Form 393. Equipment rates are derived from capital and maintenance costs per unit of equipment. Installation rates are derived from the calculation of a hourly service charge and application of that charge to different types of installations. Under our regulations, the maximum permitted rates are deemed to be reasonable, as required by the 1992 Cable Act.[9] Requiring cable operators to set all or some of their rates for programming, equipment or installation below their maximum permitted levels would force them to charge rates at levels below those specifically allowed under our rules.[10]

A. Errors in NEC's FCC Form 393

6. NEC claims it made errors in its FCC Form 393 filings with regard to its deferred income tax calculations in Schedules A (Capital Costs of Service Installation and Maintenance of Equipment) and C (Capital Costs of Leased Customer Equipment) in Part III of Form 393, and its units-in-service calculations in Schedule C. The total annual capital costs associated with maintenance and installation of cable facilities and service figure from Schedule A is used in Step A, Part III of Form 393 to calculate an operator's Hourly Service Charge. The total capital costs of customer equipment figure from Schedule C is used in Steps C, D and E to calculate an operator's leased equipment charges. NEC claims it did not discover these alleged errors, however, until after the CATC issued its rate orders based on the filings. Due to the lateness of the attempted corrections, CATC refused to reconsider its order.

7. Under the Commission's rules, cable operators have the burden of proof in demonstrating that the existing or proposed rates for their basic service tier and associated equipment are reasonable.[11] Moreover, operators also have the obligation to timely file their rate justifications with the LFAs.[12] Although we have stated that an operator should have an opportunity to cure any deficiencies in its original filing if its LFA has issued an order to toll the effective date of the proposed rates,[13] we have not required a LFA to consider information submitted by a cable operator after a rate order has been issued. Furthermore, we can find no basis to impose such an obligation under the facts in this proceeding.

8. In this instance, CATC received NEC's initial Form 393s on November 18, 1993 and December 9, 1993. A pre-hearing conference with CATC and NEC staff was held on January 27, 1994. A public hearing on NEC's From 393s was held on February 7, 1994. As a result of the public hearing, CATC kept the record open to accommodate additional information from NEC. The rate orders were not issued until May 20, 1994. NEC did not bring the errors regarding its deferred income tax and units-in-service calculations to CATC's attention until June 3, 1994, fourteen days after the rate orders were issued and over six months after NEC filed its original From 393s with CATC. Having not raised the issue with CATC before the issuance of rate orders, when the record was open and CATC could have considered the issue, NEC is not entitled to have the mistakes corrected by the Commission on appeal. Moreover, NEC has offered no reason why it could not have raised the issue earlier nor why CATC should be required to reopen the record in its proceeding. To hold otherwise would prevent LFAs from issuing rate orders in a timely fashion, since constant revisions by operators could indefinitely postpone final resolution. Based upon the best available information at the time, CATC acted reasonably in issuing its rate orders and in declining to reconsider them.

B. Substitution of line 301 for line 104 on FCC Form 393

9. NEC next contends that CATC improperly substituted its line 301 figure for line 104 on its FCC Forms 393. Line 301 reflects the costs an operator incurs in an average month for customer equipment and installations. Line 104 reflects an operator's average monthly equipment and installation revenue. Whether substitution of line 301 for 104 on FCC Form 393 is appropriate depends on whether an operator restructured its rates before the initial date of regulation. Restructured, maximum permitted rates for equipment and installation are based on actual cost.[14] If an operator had restructured its rates before September 1, 1993, to comply with benchmark rate regulation, line 301 and line 104 should be the same because the revenue received for equipment and installation (line 104) should equal the cost of the equipment and installation plus a

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[8] An operator must calculate its rate in effect on September 30, 1992, only if its current rate is above the benchmark rate. If an operator's current rate is at or below the benchmark rate, it is not required to calculate its September 30, 1992 per-channel rate.

[9] *See* Communications Act, § 623(b), 47 U.S.C. § 543(b).

[10] If a franchising authority required an operator to set its rates for equipment and installations below their maximum permitted levels, the operator could, in effect, be forced to provide equipment and installations at levels below actual cost.

[11] 47 C.F.R. § 76.937 (1993).

[12] 47 C.F.R. § 76.930 (1993) (A cable operator shall file its schedule of rates for the basic service tier and associated equipment with a franchising authority within 30 days of receiving notification from the franchising authority that the franchising authority has been certified by the Commission to regulate rates for the basic service tier.)

[13] *Rate Order* at 5709 (. . . To toll the effective date of the proposed rates, the franchising authority must issue a brief order, within the initial 30-day period, explaining that the franchising authority needs additional time to review the proposed rates. During these 90 or 150-day periods, the franchising authority *can* solicit additional information from the cable operator, if necessary, and consider the views of interested parties." (emphasis added)).

[14] *See* discussion, *supra*, at ¶ 5.

reasonable return on investment (line 301).[15] If, however, the operator had not fully restructured its rates before September 1, 1993 to comply with benchmark rate regulation, then line 104 would not necessarily be the same as line 304 since, prior to rate regulation, revenue did not necessarily have a direct relation to cost. Since the record is not clear whether NEC had fully restructured its rates before September 1, 1993 to comply with the Commission's benchmark rate regulation, we remand this issue for proper determination by CATC. If NEC had fully restructured before September 1, 1993, however, then CATC's substitution of line 301 for 104 on NEC's FCC Forms 393 was reasonable.

C. Removal of South Hampton, New Hampshire

10. NEC next contends that CATC improperly removed the basic tier subscribers from the New Hampshire community of South Hampton before the equipment basket costs of the NEC system, which included South Hampton and the Massachusetts communities of Amesbury, Merrimac and Salisbury, were allocated to each community. The equipment basket costs for these communities were aggregated by NEC on a system-wide basis in its FCC Forms 393. The costs were then allocated to each of these communities based on the number of basic service tier subscribers in each community. NEC made no further use of data related to South Hampton after the allocation. NEC claims it included the basic tier subscribers in South Hampton in the total number of basic tier subscribers served by the system in order to calculate the percentage of equipment basket costs allocable to each community. NEC further claims that CATC's removal of South Hampton's basic tier subscribers from the calculation resulted in an over-allocation of costs to the three Massachusetts communities in the system. We agree with NEC. The equipment basket costs percentages used by CATC in its rate orders distribute all system costs among the three Massachusetts communities only, rather than among the four communities actually served by the system.[16] CATC should allow NEC to allocate its system costs among all the communities served by its system, rather than just among the Massachusetts communities under CATC's jurisdiction. We therefore remand this issue to CATC for recalculation consistent with this Consolidated Order.

D. Rockport Rate Order

11. Finally, NEC claims that CATC inadvertently used the incorrect base rate and channel factor figures in Line 300 and Line 302 on the FCC Form 393 for Rockport. We agree with NEC. The instructions to FCC Form 393 specify that the information on line 300, the base rate per channel should be derived from either the base rate per channel calculated in Worksheet 1 of Form 393, line 128 or the reduced base rate per channel calculated in Worksheet 2, line 230. Form 393 instructs the operator to use one or the other figure depending on whether the base rate per channel from Worksheet 1 is greater or lesser than the adjusted benchmark rate on Worksheet 1. Here, since NEC's base rate exceeded the adjusted benchmark rate, NEC had to complete Worksheet 2 and the reduced base rate from that worksheet should be entered on line 300.[17] The number should have been 0.5226 from line 230, but CATC instead used 0.5202, apparently from line 128. Likewise, line 302, the channel factor (number of channels times number of subscribers), should have been derived from the channel factor calculation on Worksheet 2.[18] Here, CATC used 116,352, when it should have used 121,566. This issue is therefore remanded to CATC with instructions to use the correct numbers in the corresponding rate order.

III. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that NEC's appeals of CATC's local rate orders, regarding the issue of correcting errors in its FCC Forms 393, addressed in paragraphs 6 and 7 herein, (which affects all communities), ARE DENIED. The remaining issues, substitution of line 301 for 104 on FCC Form 393 (which affects all communities), removal of South Hampton, New Hampshire from the calculation of equipment basket costs (which affects the communities of Amesbury, Merrimac and Salisbury) and the transposing errors in Rockport's rate order, ARE REMANDED to CATC for resolution in accordance with the terms of this Consolidated Order. NEC's Requests for Stays for all the communities in the appeals ARE DISMISSED as moot.

13. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by § 0.321 of the Commission's rules. 47 C.F.R. § 0.321 (1993).

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[15] *See, e.g., FCC Public Notice,* Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements, Answer to Question No. 7 (released November 10, 1993). Where operators have restructured equipment rates as of September 1, 1993, absent special circumstances, the Commission expects operators will enter on Line 104 the same number as on Line 301. *Id.*

[16] The effect of CATC's orders is to increase equipment costs for each of the Massachusetts communities, which in turn, has the effect of reducing NEC's maximum permitted rate for programming. *See* discussion, *supra,* at ¶ 5.

[17] *See* FCC Form 393, Instructions for Worksheet 3, Line 300.

[18] *Id.* at Line 302.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELENOIS, INC.

Appeal of Local
Rate Order of Village of
Glenview, IL

ORDER

Adopted: December 28, 1994; Released: December 28, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Telenois, Inc. ("Telenois"), the franchisee in the above matter, filed on November 3, 1994 an Appeal of Local Cable Rate Order adopted on October 4, 1994 by its local franchising authority, the Village of Glenview, Illinois ("the Village").[1] The Rate Order establishes a new regulated rate schedule for Telenois's basic service tier rates and associated equipment.[2] Specifically, the Village's Rate Order requires Telenois to implement certain rate reductions and to issue refunds to subscribers, dating back to September 1, 1993.

2. In its review of Telenois's Form 393, the Village approved Telenois's permitted rates for some equipment and installations, but ordered Telenois to keep its rates for its basic service tier, converter boxes and remote controls at the current levels, rather than at the higher, maximum permitted levels.[3] Telenois argues that because of this misapplication of the Commission's rate regulations, the Village has improperly reduced Telenois's regulated revenues by setting its rates for basic service tier, converter boxes and remote controls below the levels permitted under the benchmark regime and has imposed a refund liability that is greater than the level allowed under our rules. Telenois argues that it should be permitted to offset its refund liability for certain equipment and installation rates with its undercharges for its basic service tier, converter boxes and remote control rates.

II. DISCUSSION

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[4] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[5] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[6] If theCommission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[7]

4. FCC Form 393 is the official form used by regulators to determine whether an operator's regulated rates for programming, equipment and installations were reasonable during the time period from September 1, 1993 until May 14, 1994.[8] Form 393 is divided into three separate, but interrelated parts. In Part II, the operator calculates its maximum permitted programming rates, while in Part III, the operator calculates its maximum permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the period of review.

5. The operator's maximum permitted rates are derived by completing Parts II and III of the Form 393, pursuant to which the operator calculates the actual aggregate revenues collected by the operator for regulated programming, equipment and installation, as of the initial date of regulation ("current rate") or as of September 30, 1992.[9] After calculating actual aggregate revenues, the operator converts

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[1] Along with its Appeal of Local Rate Order, Telenois also filed a Request for Emergency Stay on November 3, 1994. The Village of Glenview has not filed an opposition to either the stay petition or the appeal on the merits and the Commission's deadlines for receiving both filings have passed. Because we are resolving this dispute on the merits presented in the appeal, the petition for stay has been rendered moot.

[2] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[3] On the Cover Sheet (Part I) of its Form 393, Telenois's maximum permitted rate for its basic service tier is listed as $9.90, while its actual rate is listed as $9.88 per month. Likewise, Telenois's remote controls maximum permitted rate is listed as $ 0.40 per month, while its actual rate is listed as $ 0.13 per month. Finally, Telenois's maximum permitted rate for converter boxes is listed as $ 2.24 per month for type 1 and $5.33 for type 2, while its actual rate is listed as $0.85 and $1.35 per month, respectively. The Village set Telenois's rates for its basic service tier, remote controls and converter boxes (type 1 and 2) at $ 9.88, $0.13, $0.85 and $1.37 per month, respectively.

[4] *See* 47 C.F.R. § 76.944.

[5] *See Report and Order and Further Notice of Proposed Rulemaking in MM Docket 92-266*, 8 FCC Rcd 5631, 5731(released May 3, 1993) (*"Report and Order"*); *Third Order on Reconsideration in MM Docket 92-266*, FCC 94-40, slip op. at ¶ 81 (released March 30, 1994) (*"Third Recon. Order"*).

[6] *Id.*

[7] *Id.*

[8] To the extent that an operator has sought to take advantage of the refund deferral period available under the *Second Order on Reconsideration, Fourth Report an Order, and Fifth Notice of Proposed Rulemaking in MM Docket 92-266*, 9 FCC Rcd 4119, 4183-4185 (1994), the maximum permitted rates determined under Form 393 may also apply from May 15, 1994 until the date that the operator implemented its new rates, as determined under the Form 1200 series.

[9] An operator must calculate its rate in effect on September 30,

those revenues to a per-channel rate, and then compares the per-channel figures to the applicable benchmark rate. If an operator's current per-channel rate is below the applicable benchmark rate, then the operator's rate is deemed reasonable, but it must remain at its current level. If its current per-channel rate exceeds the benchmark rate, the operator must then compare its September 30, 1992 per-channel rate to the applicable benchmark rate. If its September 30, 1992 per-channel rate is above the benchmark rate, it must reduce this rate to the benchmark rate or by 10%, whichever reduction is less. The adjusted rate will be its maximum permitted rate for programming. Maximum permitted rates for equipment and installation are based on actual cost and are calculated in Part III of the Form 393. Equipment rates are derived from capital and maintenance costs per unit of equipment. Installation rates are derived from calculation of an hourly service charge and application of that charge to different types of installations. Under our regulations, the maximum permitted rates are deemed to be reasonable, as required by the 1992 Cable Act.[10] Requiring cable operators to set all or some of their rates for programming, equipment or installation below their maximum permitted levels would force them to charge rates at levels below those specifically allowed under our rules.[11]

6. If a franchising authority does not dispute the bases for the figures presented in a cable operator's Form 393 or has not discovered any mathematical errors in the form, the franchising authority should then approve the operator's maximum permitted rates, as derived by the form. A franchising authority should not require the operator to set a particular rate for programming, equipment or installations at any rate less than its maximum permitted rate, even if its current or actual rate is below its maximum permitted rate. Instead, the franchising authority should allow the operator to charge up to its maximum 0 permitted rates, as derived by Form 393.[12] In this proceeding, the Village only disputed the validity of Telenois's number of addressable converter boxes in service, an issue Telenois does not contest on appeal. Otherwise, the Village did not dispute the figures used in Telenois's Form 393 or the accuracy of the calculations in the form. Therefore, the Village should allow Telenois to charge its maximum permitted rates, as derived by the Form 393.

7. After setting the various regulated rates that an operator is permitted to charge on a prospective basis, a franchising authority should then determine if the operator is liable for any subscriber refunds. A refund liability can be imposed when an operator's actual charges exceed maximum permitted levels during the applicable period of review.[13] If an operator's aggregate revenues computed from its actual rates exceeded its revenues computed from its permitted rates during the period of review, the operator must refund the difference to subscribers.[14] If the operator's aggregate revenues computed from its permitted rates exceeded its aggregate revenues computed from its actual rates, the operator will not be required to issue any refunds for that period of review. In this proceeding, any refunds to be paid by Telenois should be calculated based on this method.

8. While the Commission will sustain the decisions of franchising authorities if there is a reasonable basis for doing so, we expect franchising authorities to adhere to the mathematical principles underlying the benchmark methodology, particularly when calculating an operator's refund liability.[15] For instance, in this case, the Village may not order Telenois to set its basic service tier and equipment rates below maximum permitted levels. Further, the Village must offset or reduce any refunds it may order by the difference between the actual equipment rates that Telenois charged and the maximum permitted rates that it could have charged during the applicable period of review.[16] According to Telenois's uncontested submission, the Village has directed Telenois to charge less than its maximum permitted levels for certain components of its regulated service and equipment and to issue refunds without regard to the fact that some rates are below maximum permitted levels. We are remanding this case to the Village so that it can reconsider its ruling in a manner consistent with our findings.[17]

9. Accordingly, IT IS ORDERED that Telenois's appeal of The Village of Glenview's local Rate Order, regarding the issue of Telenois's permitted charges for basic service tier, converter boxes and remote controls and related refunds IS REMANDED to the local franchising authority for resolution in accordance with the terms of this Order. The request for emergency stay is hereby rendered moot and therefore IS DISMISSED.

10. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

1992, only if its current rate is above the benchmark rate. If an operator's current rate is at or below the benchmark rate, it is not required to calculate its September 30, 1992 per-channel rate.

[10] *See* Communications Act, § 623(b), 47 U.S.C. § 543(b).

[11] If a franchising authority required an operator to set its rates for equipment and installations below their maximum permitted levels, the operator could, in effect, be forced to provide equipment and installations at levels below actual cost.

[12] An operator is not required, however, to raise its rates to the maximum permitted level. An operator may voluntarily choose to charge less than the maximum permitted rate.

[13] *See* 47 C.F.R. § 76.942.

[14] *See Third Recon. Order* at ¶ ¶ 103-104 ("Although maximum permitted rates are always determined on an unbundled basis, *i.e.*, separately for program service and equipment, refund liability may stem from bundled rates. We conclude that the refund liability should be calculated based on the difference between old bundled rates and the sum of the new unbundled program service charge(s) and the new unbundled equipment charge(s).").

[15] *See Report and Order* at 5731; *Third Recon. Order* at ¶ 81.

[16] *See Third Recon. Order* at ¶ ¶ 103-104.

[17] *See TCI Cablevision of North Central Kentucky, Inc.* (Mount Washington, KY), DA 94-1479 (released December 14, 1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NewChannels	CUID Nos. NY0991,
Corporation	NY0992, NY0993
Syracuse, New York	NY0995, NY1026, NY1072, NY1106 and NY1376

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: December 29, 1994; Released: December 30, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price NewChannels Corporation ("NewChannels") was charging for its cable programming service ("CPS") tier in CUID NY0991, NY0992, NY0993, NY0995, NY1026, NY1072, NY1106 and NY1376 . NewChannels has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of NewChannels's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

Procedural Matters

4. The first CPS complaint was completed and served on NewChannels on December 30, 1993.[11] The Commission received the complaint on January 3, 1994.

5. NewChannels attempted to justify its CPS price through FCC Form 393's filed on February 14, 1994 for CUID Nos. NY0992, NY1026, NY1072, NY1106 and NY1376, February 15, 1994 for CUID Nos. NY0993 and NY0995, February 16, 1994 for CUID No. NY0991. NewChannels amended its justification on June 24, 1994, in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[12]

II. DISCUSSION

6. NewChannels asserts that its monthly CPS tier price of $13.20 per subscriber is justified by its benchmark filing because its price is equal to the maximum permitted charge of $13.20 as calculated in the filing. Upon review of NewChannels's Form 393, we have found no apparent errors that would require a recalculation of NewChannels's maximum permitted CPS price.

III. CONCLUSIONS

7. Upon review of the record herein, we conclude that NewChannels has demonstrated that $13.20 per month (plus franchise fee) was the maximum reasonable CPS tier price for the period January 3, 1994 to May 14, 1994.[13]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent NewChannels has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration*, n.7 *infra*, the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which NewChannels implemented its CPS price under the new regulations. See para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*); 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

[11] The complaint was dated December 30, 1993 and states that it was mailed to NewChannels on that date. NewChannels has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider December 30, 1993 as the service date.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526 (released May 23, 1994).

[13] This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein. This finding is based solely on the representations of NewChannels listed in paragraph 5, *supra*, and the modifications

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints against the cable programming service price charged by NewChannels Corporation, CUID Nos. NY0991, NY0992, NY0993, NY0995, NY1026, NY1072, NY1106 and NY1376, and all other complaints relating to the same price, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED, that the benchmark filing submitted by NewChannels Corporation with respect to CUID Nos. NY0991, NY0992, NY0993, NY0995, NY1026, NY1072, NY1106 and NY1376 for the period of January 3, 1994 to May 14, 1994, justifies a maximum price of $13.20 per month (plus franchise fee) for NewChannels Corporation's cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

described in paragraph 6, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Centel Cellular of North Carolina Limited Partnership — File No. 519WT0001

Notice of Apparent Liability for Forfeiture for Station KNKA291 in the Domestic Public Cellular Radio Telecommunications Service Serving Market 47B at Greensboro, North Carolina

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: December 16, 1994; Released: December 16, 1994

By the Commission:

I. INTRODUCTION

1. We find in this Notice of Apparent Liability for Forfeiture that Centel Cellular of North Carolina Limited Partnership (Centel) apparently violated three Commission Rules. Specifically, Centel failed to notify the Federal Aviation Administration (FAA) before constructing an antenna structure for which notification is required, failed to provide for required safety lighting on the structure, and failed to obtain FAA approval for constructing the structure. This resulted in an ongoing air safety hazard which lasted approximately five months. We consider these violations extremely serious because of the potential danger to aviation.[1] Our concern in this instance is heightened because it appears that the licensee was negligent in preparing to construct this tower. We rely on the diligence of our licensees and we cannot countenance such a failure. For these reasons, the Commission makes a finding of apparent liability for forfeiture in the amount of $3,000,000.

II. BACKGROUND AND FACTS

2. On April 29, 1985, the Commission granted Centel its initial authorization to operate a cellular system to serve Market 47B at Greensboro, North Carolina. On December 17, 1993, Centel completed construction of an antenna structure near Guilford, North Carolina, placed this additional facility into operation, and submitted FCC Form 489 to the Commission notifying the Commission of completion of construction and commencement of operation.[2] The antenna structure, located 2.3 nautical miles (4.3 kilometers) from the Greensboro/Piedmont Triad International Airport, penetrated the airport's "air safety zone."[3] On March 23, 1994, the Commission's Common Carrier Bureau sent a letter to Centel,[4] which requested a copy of the FAA Determination for the antenna structure because Bureau staff noticed that the FAA study number listed on the FCC Form 489 filed by Centel pertained to a different cell site.[5] By letter of April 29, 1994, Centel acknowledged that it had never obtained an FAA Determination for the Guilford cell site but that one would be forthcoming as soon as possible.[6] Centel explained that the original land survey performed at the Guilford cell site was erroneous and caused Centel to believe that FAA notification and approval were not required. In particular, at the time Centel constructed the antenna structure, it concluded that the ground elevation was 900 feet. The actual ground elevation, however, is 924 feet. Moreover, the Commission has learned that Centel had in its possession documents which accurately showed this 924-foot ground elevation but apparently failed to utilize those documents. As a result of this error, the tower constructed by Centel in December 1993 exceeded the permissible height by 21 feet. On May 3,

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[1] *See Radio Beaumont, Inc.*, 13 FCC 2d 965, 966 (1968).

[2] The Commission permits a cellular licensee to construct and operate additional transmitters within its licensed Cellular Geographic Service Area without prior approval, provided that the licensee complies with all Commission Rules. Centel treated its Guilford cell site as an additional transmitter.

[3] Section 17.7 of the Commission's Rules, 47 C.F.R. § 17.7, sets forth the criteria for determining whether applications for transmitter towers require FAA notification. The criteria in Section 17.7(b)(1) describe an imaginary surface that extends outward and upward for a specified radius from an airport that represents the safe angle of departure or approach by aircraft from, or to, an airport. Although the record leading to the Notice of Apparent Liability for Forfeiture (NAL) in the proceeding currently before us uses the more common colloquial term "glide slope" to describe this surface; in this NAL we refer to the surface described in Section 17.7(b)(1) as the "air safety zone."

[4] *See* Letter to counsel for Centel from J. Cimko, Chief, Mobile Services Division (Mar. 23, 1994). In March 1993, the Common Carrier Bureau approved applications of Sprint Corporation (Sprint) and Centel Corporation (Centel Corp.) to transfer to Sprint the control of common carrier radio authorizations held by Centel Corp.'s subsidiaries and affiliates. *See Centel Corporation*, 8 FCC Rcd 1829 (Com. Car. Bur. 1993). Under the approved transaction, Centel Corp. became a wholly-owned subsidiary of Sprint. Following the merger, the licenses and authorizations then held by Centel Corp.'s subsidiaries and affiliates continued to be held by those companies and partnerships. One of those subsidiaries is Centel Cellular of North Carolina Limited Partnership, which herein is referred to as Centel. The record leading to the NAL in the proceeding currently before us indicates that there has been correspondence between the Commission and counsel for Centel, as well as correspondence between the Commission and Sprint and Sprint Cellular Company. For purposes of simplicity, we will reference the correspondence as if it were sent to and received from Centel exclusively.

[5] An FAA Determination is an aeronautical study of a proposed structure with regard to possible intrusions into air zones used by aircraft, *i.e.*, flight routes, airport runways, *etc.* This study contains recommendations for any necessary marking (*e.g.*, painting with aviation orange and white colors) and lighting (*e.g.*, red obstruction lights or white strobe lights), as well as necessary alterations to the structure to ensure the safety of air navigation in the vicinity of the structure. If an antenna structure is deemed to be a hazard to air navigation, it represents a potential threat to the safety of life and property.

[6] *See* Letter to W. Caton, Acting Secretary, FCC, from Centel/Sprint (Apr. 29, 1994).

1994, Centel submitted FAA Form 7460-1 (Notice of Proposed Construction or Alteration) to the FAA with correct site elevation data and requested an FAA Determination.[7]

3. On May 11, 1994, the initial FAA Determination advised Centel that the antenna structure must be reduced in height from 187 feet to 166 feet so that it would not exceed aviation obstruction standards.[8] The FAA that same day issued a notice to pilots and navigators warning of the air safety hazard. The following day, May 12, 1994, the FAA advised the Commission that the antenna structure "exceeds FAA obstruction standards and would have a substantial adverse effect on instrument approach procedures at Greensboro/Piedmont Triad Airport" and requested the Commission to take action. On May 14, 1994, a Field Operations Bureau investigator confirmed the height of the structure to be 187 feet above ground level and observed that the antenna structure lacked obstruction lighting required by the Commission's Rules. On May 16, 1994, the Field Operations Bureau advised Centel that the antenna structure was observed without obstruction lighting and directed Centel to illuminate the structure immediately.[9] That same day, the Common Carrier Bureau telephoned Centel and instructed it to lower the structure immediately and to add temporary lighting. The Common Carrier Bureau contacted Centel immediately after receiving a telephone call from the FAA requesting the FCC's assistance in addressing the air safety hazard. After the two Bureaus contacted Centel, Centel installed two red flashing temporary beacons on the top of the antenna structure on May 16. Centel reduced the height of the tower on May 17. On May 18, 1994, the FAA completed its Final Determination regarding the structure and notified Centel that at the reduced height of 166 feet, the tower would not be a hazard to air navigation provided that Centel installed permanent red obstruction lighting.[10] Centel installed a permanent red flashing beacon at the top of the structure and two steady-burning side lights at the mid-point of the structure on May 18. It then submitted a second FCC Form 489 for the Guilford site, using the lowered height of the antenna structure and the proper site elevation.

III. DISCUSSION

4. Under Part 22 of our Rules, 47 C.F.R. §§ 22.0 - 22.1121, we permit cellular companies to construct antenna towers without prior Commission approval but require that they be in compliance with all FAA requirements relating to notification, approval, and tower lighting and marking.[11] Therefore, in order for a licensee to fulfill these Part 22 requirements, it must provide notification to the FAA of a proposed tower construction in the circumstances specified in Section 17.7 of the Commission's Rules, 47 C.F.R. § 17.7. This notification enables the FAA to perform a study to determine if a hazard to air navigation would exist if the tower were constructed as proposed. Cellular licensees must comply with the results of this study, including the specifications for tower lighting and marking. The Commission has given cellular licensees wide latitude to construct, maintain, and upgrade their licensed systems in order to provide expeditious service to the public. Given this latitude, the Commission must demand a very high standard of diligence on the part of licensees when constructing towers. The Commission places extreme importance on tower safety because obstructions to air navigation pose serious threats to the safety of life and property and are contrary to one of the core purposes of the Act. *See* 47 U.S.C. § 151. Consequently, the Commission views violations of tower safety rules that create such safety risks as matters warranting prompt and strict penalties. In 1989, the Commission specifically alerted licensees to the seriousness of tower lighting violations. *Air Hazards Caused by Improperly Marked and Lighted Communications Towers,* 66 Rad. Reg. 2d (P&F) 924 (1989). Licensees were warned that, "Appropriate action, including issuance of fines and/or revocation of the station license, will be taken against the user or owner" of any improperly lighted or marked radio tower. *Id.* Licensees must adhere strictly to all FAA and Commission rules and regulations concerning antenna structure construction that are designed to protect the public against such safety hazards.

5. Section 17.7 of the Commission's Rules, 47 C.F.R. § 17.7, provides in pertinent part:

> A notification to the Federal Aviation Administration is required ... for any of the following construction or alteration:
>
> . . .
>
> (b) Any construction or alteration of greater height than an imaginary surface extending outward and upward at one of the following slopes:

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[7] A licensee submits a notification of a proposed structure to the FAA so that an aeronautical study may be performed by the FAA. *See* note 5, *supra*. As indicated, Section 17.7 of the Commission's Rules sets forth criteria for determining whether notification to the FAA is required. Specifically, notification is required for any antenna structure that is either: (a) 200 feet or higher, or (b) in close proximity to an airport and the structure would exceed the landing or take-off surfaces (*i.e.*, the "air safety zone"). *See* Section 17.7 of the Commission's Rules, 47 C.F.R. § 17.7.

[8] *See* Facsimile of FAA Determination (Acknowledgment of Notice of Proposed Construction or Alteration) from R. Shipp, Airspace Specialist, Southern Region to Sprint Cellular (May 11, 1994). The FAA Determination specifically stated that because the structure was close to the airport, the overall height of the antenna structure may not exceed 1,090 feet above mean sea level (AMSL). AMSL consists of the antenna structure height and the site elevation. Because the ground elevation at the antenna site is 924 feet, the maximum permissible height of the antenna structure is 166 feet above ground level (*i.e.*, 1,090 - 924 = 166). In short, the FAA Determination notified Centel that the antenna structure, as constructed, exceeded the maximum permissible height by 21 feet.

[9] *See* Facsimile and Letter to Centel from J. Freeman, Engineer-In-Charge, Norfolk Field Office, Field Operations Bureau (May 16, 1994).

[10] *See* Facsimile of FAA Determination (Acknowledgment of Notice of Existing Construction or Alteration) to Sprint Cellular from R. Shipp (May 18, 1994).

[11] Indeed, when the Commission first proposed allowing additional transmitters to be constructed without Commission authorization, the Commission explicitly stated that "licensees must have received FAA approval of the antenna structure. Even though FAA requires such prior approval, this requirement in our rules will ensure that potential aviation hazards are not overlooked." *Revision and Update of Part 22 of the Public Mobile Radio Services Rules,* Notice of Proposed Rulemaking, 47 Fed. Reg. 43842, 43867 (Oct. 4, 1982).

> (1) 100 to 1 for a horizontal distance of 6.10 kilometers (20,000 feet) from the nearest point of the nearest runway of each airport specified in paragraph (d) of this section with at least one runway more than 0.98 kilometers (3,200 feet) in actual length, excluding heliports.[12]

Section 17.21 of the Commission's Rules, 47 C.F.R. §17.21, provides in pertinent part:

> Antenna structures shall be painted and lighted when:
>
> (a) They exceed 60.96 meters (200 feet) in height above the ground or *they require special aeronautical study*. (emphasis added)

Section 22.117 of the Commission's Rules, 47 C.F.R. §22.117, provides in pertinent part:

> (b) Additional transmitters. Licensees may construct and operate additional transmitter locations on the same frequency without obtaining prior Commission approval provided:
>
> . . .
>
> (3) Full FAA approval has been obtained. The notification shall state that such clearance has been granted; or if it is a new antenna structure it does not exceed 6 meters (20 feet) high, or if on an existing structure the overall height of the existing structure has been raised. If it is an existing antenna tower the licensee must submit marking and lighting specifications from Forms 715 and/or 715a.

6. Centel does not dispute that it was required to notify the FAA prior to construction of the Guilford antenna structure. Further, the record amply demonstrates that both the FAA and the Commission's Rules require lighting of Centel structure. Additionally, Centel does not dispute that it was required to have received full FAA approval for construction of the antenna structure before Centel proceeded with construction.

7. Section 503 of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. § 503, states in pertinent part:

> (b)(1) Any person who is determined by the Commission, ... to have--
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> . . .
>
> (B) willfully or repeatedly failed to comply with any of the provisions of this Act or of any rule, regulation, or order issued by the Commission under this Act ...
>
> . . .
>
> shall be liable to the United States for a forfeiture penalty.

Based upon the facts detailed above, we find that: (1) Centel's failure to notify the FAA prior to constructing the antenna structure for the Guilford cell site apparently violated Section 17.7(b)(1); (2) Centel's failure to light the antenna structure apparently violated Section 17.21(a); and (3) Centel's failure to obtain FAA approval for construction of an additional antenna structure apparently violated Section 22.117(b)(3). In addition, we find that each violation constitutes willful and repeated conduct within the terms of the Act.[13]

8. In this case, Centel provided the notification of the antenna structure to the FAA only after the antenna structure had been built and had remained standing without lighting for five months. When the FAA was notified and completed its study, the study revealed that the structure penetrated the "air safety zone" and required a reduction in height and red obstruction lighting. *See* Section 17.21(a) of the Commission's Rules. Moreover, Centel's claim that air traffic is impractical at the 166-foot elevation because five other towers of comparable height are in the vicinity is unpersuasive. Aircraft operate within a defined area of safe navigation near an airport, *i.e.*, the "air safety zone." This area of safe navigation establishes the permissible height of towers located within this area and specifies the markings that must be attached to each tower. The majority of towers within a five mile radius of the airport penetrate the "air safety zone" but all of the towers, including the five towers referenced by Centel, obtained FAA Determinations and are painted and lighted as required by the FAA. The FAA made a similar Determination on Centel's tower and prescribed lighting accordingly. The serious threat to air navigation safety created and perpetuated by Centel for five months is unprecedented and clearly demonstrates the grave nature of these violations.

9. When the public safety is at issue, we think it is incumbent upon licensees to comply in all respects with all applicable FAA and FCC requirements. In this case, the Guilford tower continued to penetrate the "air safety zone"

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[12] Section 17.7(b)(1) applies in this proceeding because of the proximity of the antenna structure to the Guilford airport and the length of the airport's runways.

[13] Section 312(f)(1) of the Communications Act, 47 U.S.C. § 312(f)(1), provides:

> The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.

This definition applies to Section 503(b) of the Communications Act. *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

> Section 312(f)(2) of the Communications Act, 47 U.S.C. § 312(f)(2), provides:
>
> The term "repeated", when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.

This definition also applies to Section 503(b) of the Communications Act. *See* H.R. Rep. No. 97-765, 97 Cong. 2d Sess. 50-51 (1982).

and remained unlit for five months. This situation presented a serious threat to public safety and demanded prompt and effective corrective action by the licensee.

10. We emphasize that this proceeding is the first known case in which an antenna structure was constructed without the prior notification to the FAA in which the antenna structure exceeded the "air safety zone" and, furthermore, required red obstruction lighting. Moreover, the serious safety threats remained for the entire five-month period that elapsed from the time of construction until ultimate compliance. Violations involving serious risk to public safety have previously been treated by the Commission as warranting substantial enforcement action, particularly where, as here, the safety hazard was not immediately remedied. *See, e.g., Emmis Broadcasting Corp. of St. Louis*, 6 FCC Rcd 2289 (1991) (maximum forfeiture warranted where radio station broadcast false nuclear attack and did not broadcast a retraction for two hours); *David R. Price*, 7 FCC Rcd 6550 (1992) (license revoked for failure to maintain tower lights for five months).

11. Section 503(b)(2)(B) of the Communications Act, 47 U.S.C. § 503(b)(2)(B), in relevant part, provides that the amount of any forfeiture penalty determined under this subsection shall not exceed $100,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $1,000,000 for any single act or failure to act. Each of the three aforementioned rule violations was continuing for approximately five months and, thus, each one constitutes a continuing violation. Accordingly, under Section 503(b)(2) of the Communications Act, a forfeiture of up to $1,000,000 can be imposed for each of the specified rule violations. Based upon the serious and continuing nature of the safety-related violations for five months, the assessment of $1,000,000 for each rule violation is appropriate. We therefore propose a $1,000,000 forfeiture for violation of Section 17.7(b)(1), a $1,000,000 forfeiture for violation of Section 17.21(a), and a $1,000,000 forfeiture for violation of Section 22.117(b)(3), for a total forfeiture of $3,000,000.[14]

12. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, Centel Cellular of North Carolina Limited Partnership IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of three million dollars ($3,000,000) for willful and repeated violations of the aforementioned Rules. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934.

13. Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, within thirty (30) days of the release of this Notice, to Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should note the File Number of the above captioned proceeding.

14. A copy of this Notice is being sent to Centel Cellular of North Carolina Limited Partnership by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[14] Section 17.7(b)(1) was violated for 137 days (from December 17, 1993, to May 3, 1994); Section 17.21(a) was violated for 150 days (from December 17, 1993, to May 16, 1994); and Section 22.117(b)(3) was violated for 151 days (from December 17, 1993, to May 17, 1994). As mentioned above, the Act provides that the amount for any forfeiture penalty shall not exceed $100,000 for each day of a continuing violation.47 U.S.C. § 503(b)(2)(B).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

ESPANOLA PUBLIC SCHOOLS
Santa Fe, New Mexico — File No. BPLIF-920608DM

SANTA FE COMMUNITY COLLEGE
Santa Fe, New Mexico — File No. BPLIF-921015DC

For Construction Permit
and License in the Instructional
Television Fixed Service
on Channels D1-D4

MEMORANDUM OPINION AND ORDER

Adopted: December 9, 1994; Released: January 24, 1995

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Espanola Public Schools (Espanola) and Santa Fe Community College (SFCC), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels D1-D4 in the area of Santa Fe, New Mexico.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a) (1)-(5). Both applicants are qualified to be ITFS licensees. Espanola is a school district that is accredited by the State of New Mexico Department of Education and that is applying to provide ITFS service to students enrolled at schools within its jurisdiction. SFCC is a community college that is accredited by the North Central Association of Colleges and Schools and that is applying to provide ITFS service to its own enrolled students.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523,* (*Second Report and Order*), 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions, or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F Channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Espanola is entitled to four points because it is a school district that proposes to serve the formal educational needs of students at schools located within its jurisdiction. Likewise, SFCC is entitled to four points because it is a community college that proposes to serve the formal educational needs of its own enrolled students.

Accreditation. Espanola is entitled to three points because it is accredited by the State of New Mexico Department of Education. SFCC is also entitled to three points because it is accredited by the North Central Association of Colleges and Schools.

Four-Channel Limitation. Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

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[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order,* 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a programming "grid." Espanola's illustrative schedule and programming grid propose an average of 24.375 hours of formal educational programming per channel per week. Thus, Espanola is entitled to one programming merit point. In contrast, SFCC's illustrative schedule and programming grid, as timely amended, propose an average of 42 hours of formal educational programming per channel per week. Thus, SFCC is entitled to two programming merit points.

E- and F- Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, neither is entitled to the one point for such applicants.

Total. Espanola is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and one point for proposing at least 21 hours of formal educational ITFS programming per channel per week, for a total of ten points. SFCC is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and two points for proposing at least 41 hours of formal educational ITFS programming per channel per week, for a total of eleven points. Thus, the tentative selectee is SFCC.

OTHER MATTERS

5. In its application as initially filed, SFCC proposed to present an average of 20 hours of ITFS programming per channel per week, all of which was to be formal educational programming. On the "B" cut-off date of July 20, 1993, however, SFCC amended its application to propose a weekly per channel average of 42 hours of formal educational programming. That amendment, SFCC later claimed, was consistent with the 168 hours of weekly airtime specifically provided for SFCC's use in its excess capacity lease agreement with MultiMedia Development Corporation (MultiMedia), and entitled SFCC to two programming merit points, pursuant to the ITFS comparative selection process. Espanola challenges these claims, arguing that other lease provisions afford SFCC access to only 40 hours of airtime per channel per week to meet its ITFS programming schedule needs. Specifically, Espanola points to Paragraph 2(b) of the lease agreement which states that the total 168 hours of airtime "shall include twenty (20) hours of Air-time for each channel each week (Monday through Saturday) to be used by Lessor for its ITFS scheduled programs aired between the hours of 8:00 a.m. and 10:00 p.m. . . . [and] Lessor reserves for any expanded ITFS program schedule needs, an additional twenty (20) hours of weekly airtime per licensed channel, between the hours of 8:00 a.m. and 10:00 p.m. . . . (Monday through Friday) excluding Holidays and vacation days." According to Espanola, the Commission should treat these inconsistent lease provisions in the same manner as it interprets discrepancies between an applicant's illustrative schedule and its programming grid, namely, in a manner that results in the fewest points to the applicant.[3] Further, Espanola contends that SFCC does not have immediate access to 42 hours per channel per week since Paragraph 2(c) of the lease agreement requires SFCC to provide MultiMedia with 120-days notice of any modification to its programming schedule, including SFCC's intent to recapture airtime. In Espanola's view, the applicants should be considered tied comparatively, and it urges the Commission to evaluate the applicants' student enrollment figures pursuant to the ITFS tie-breaker mechanism.

6. As indicated previously, the Commission's primary focus in evaluating an ITFS applicant's programming proposed is directed to the detailed illustrative schedule and programming grid prescribed in the ITFS application form (FCC Form 330). Where the amounts and types of programming proposed in the schedule and in the programming grid are inconsistent, we consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant. See *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924 (1992). Thereafter, we look to any excess capacity lease agreement to ensure that the amount of programming to be transmitted, that is credited to the applicant, is demonstrably permitted under the lease. See *Harlem Consolidated School District #122*, FCC 94-312, adopted December 8, 1994. Further specification in the lease agreement of the types of programming and the amounts thereof has not been deemed either necessary or appropriate. Indeed, we would consider the inclusion of such provisions in a lease agreement to be unduly restrictive of the applicant's operation of the proposed ITFS facility and we would, as we have done with respect to other lease provisions that did not conform with our requirements, require the applicant to make whatever changes were appropriate. *E.g., Blackwell Consolidated Independent School District*, 9 FCC Rcd 1721 (1994). Against this backdrop, further consideration of the inconsistent provisions complained of in Paragraph 2(b) does not appear warranted. Here, the lease agreement demonstrates a total of 168 hours of airtime available to SFCC, which supports the provision of an average of 42 hours per channel per week as proposed in the July 20, 1993 amendment.

7. Paragraph 2(c) of the lease agreement does require 120-days notice to MultiMedia for any modifications to SFCC's initial schedule or any recapture of airtime provided for in that schedule but not actually utilized by SFCC. However, that paragraph also specifically provides that within 30 days after Commission grant of its application, SFCC shall present Multi Media with "its schedule in accordance with paragraph 2(b) hereof," a provision that affords access to a total of 168 hours of airtime, apparently immediately. Even if a 120-days notice were required, we would not find that notification requirement, standing alone, sufficient to discredit SFCC's programming proposal. Pursuant to Section 73.3598 of our rules, ITFS applicants, such as SFCC, are afforded an 18-month period within which to construct their facilities. There are no facts or other information before us to indicate that the 120-days notification requirement would preclude SFCC from being

[3] On July 5, 1994, SFCC amended Paragraph 2(b) of its lease agreement to increase its reservation for expanded ITFS program schedule needs from 20 to 22 hours. Espanola submits that this post "B" cut-off date amendment should be considered for Section 1.65 reporting purposes only.

able to effectuate fully, as we expect all similar ITFS applicants, the programming proposal for which it obtained comparative credit at the time the ITFS facilities are constructed and service is commenced. In view of the foregoing, we conclude that our award of the two programming merit points to SFCC is proper and that invocation of our ITFS comparative tie-breaker mechanism in this proceeding is not warranted.

8. As indicated above, SFCC proposes to lease its excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931, and has submitted a copy of its lease with MultiMedia. Our review of the other provisions set forth therein finds that they conform in all respects with our requirements for such leases.

9. No petitions to deny or informal objections have been filed against SFCC's application, and we find SFCC fully qualified to be an ITFS licensee. We also conclude that grant of SFCC's application would serve the public interest, convenience and necessity.

10. Accordingly, IT IS ORDERED, That the application of Espanola Public Schools (BPLIF-920608DM) IS DENIED, and the application of Santa Fe Community College (BPLIF-921015DC) IS GRANTED.

11. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
December 13, 1994

Released: December 16, 1994

IN REPLY REFER TO:
DA 94-1474

E! Entertainment Television, Inc., c/o
Donna C. Gregg, Esq.
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20008

Dear Ms. Gregg:

This letter is in response to your letter of December 5, 1994, requesting expedited clarification of the Commission's notice requirements as applied to the scheduled addition of the E! Entertainment Television, Inc. ("E!") channel to cable programming service tiers ("CPSTs") prior to January 1, 1995.

Pursuant to Sections 76.964 and 76.309(c)(3)(i)(B) of the Commission's rules, cable operators are required to provide subscribers and local franchising authorities with thirty days written notice of any rate or service change. You request expedited clarification of the Commission's notice requirements to allow multiple system operators ("MSOs") to provide initial notice of these service and rate adjustments to subscribers using alternative means, including newspaper and on-screen announcements in lieu of the thirty days written notice required by our rules. You cite our letter of November 30, 1994 regarding The Disney Channel (the "Disney Letter Order") and ask for similar relief in the case of the E! channel.[1]

Our rules regarding subscriber notice of rate or service changes are intended in part to provide subscribers ample time to react and, if they so elect, to cancel any service they no longer wish to receive due to the rate or service change. We believe, however, that, under the limited circumstances described in your letter and in substantially similar situations involving other programming services, and given the transitional nature of your request and similar requests we have received, a waiver of our notice provisions is appropriate. We note that adding a channel to a CPST (or to a basic service tier where an operator offers only one tier of regulated cable service) on January 1, 1995, as provided in our *Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking* in MM Docket Nos. 92-266 and 93-215, FCC 94-286 (released November 18, 1994) (*"Sixth Order"*), and literal compliance with the referenced notice regulations, is not feasible in all cases given the time frame between the release of *Sixth Order* and the effective date of our revised going forward rules adopted therein. We also believe that the conditions to this waiver described below will adequately protect subscribers from undue harm.

We therefore waive our notice requirements contained in Sections 76.964 and 76.309(c)(3)(i)(B) of the Commission's rules with respect to the addition of the E! channel, as well as the addition of similarly situated channels, to CPSTs prior to January 1, 1995, with the corresponding rate increase effective on January 1, 1995. We limit this waiver, however, to the condition that notice be provided through alternative means substantially similar to those described in the Disney Letter Order, which incorporates by reference conditions in the November 23 letter from Disney to the Cable Bureau,[2] but no less likely to come to the attention of a substantial number of viewers, namely weekly newspaper advertisements in a major newspaper or newspapers with circulation throughout each affected cable community, on-screen messages on a daily basis, notifying local franchising authorities as soon as practicable, and written notice to subscribers beginning by early to mid January, 1995.[3] This waiver applies to new channels added to a system's offerings, as well as to channels previously offered on the system on an a la carte basis. This is a blanket waiver which is applicable to all similarly situated operators seeking to add cable programming services as described above.

Because our notification rules are intended in part to provide subscribers with the opportunity to cancel any service they no longer wish to receive due to a rate or service change, we will require, as a further condition of this waiver, that, if any subscriber cancels his or her subscription to the relevant CPST within thirty days after the date of the first bill reflecting the increased rate, the operator must refund to that subscriber the incremental dollar amount attributable to the addition of the E! channel, and of all other channels added pursuant to this waiver, to the CPST from December 31, 1994 (the date the E! channel will be added to the CPSTs) to the date the subscriber cancels the CPST.

Sincerely,

Meredith J. Jones
Chief, Cable Services Bureau

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[1] *See In re The Disney Channel*, DA 94-1346 (Cable Services Bureau, adopted November 30, 1994).

[2] Letter from Frederick Kuperberg, Senior Vice President, Business and Legal Affairs, The Disney Channel, to Meredith J. Jones, Chief, Cable Services Bureau (November 23, 1994).

[3] We note that we have previously granted waivers of our notice provisions in transitional situations where the cable operator provides similar substitute advance notice. *See, e.g., In re fX* (released May 9, 1994) (providing limited waiver of notice provisions in 47 C.F.R. §§ 76.964 and 76.309(c)(3) as applied to the launch of the new fX channel).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 14, 1994

Request for Waiver to Use Frequencies in the 482-488 MHz Band in New York City

A Request for Conditional Waiver of Parts 2 and 90 of the Commission's Rules and Regulations to permit use of frequencies in the 482-488 MHz band (television Channel 16) was submitted by the New York City Public Safety Agencies (NYCPSA) on November 21, 1994, along with supporting material.

NYCPSA consists of twelve local government public safety organizations in the New York Metropolitan Area. On April 10, 1992, NYCPSA filed a Joint Request for Waiver to permit these agencies to operate public safety radio stations on Channel 16. On April 14, 1994, NYCPSA submitted a Supplement to the Request for Waiver. On November 21, 1994 it submitted a Request for Conditional Waiver, which amends the Joint Request filed in April, 1992. Attached to the Request is an Agreement between the Television Broadcasters All Industry Committee (TBAIC) and NYCPSA, that sets forth the terms of the proposed public safety operation. The TBAIC filed concurrently a Statement in Support of the Conditional Waiver Request.

NYCPSA argues that delays in and interference to critical radio transmissions are currently experienced in the New York area. NYCPSA further states there is no spectrum available currently to coordinate responses of multiple agencies in emergency situations. NYCPSA contends that there is an immediate need for spectrum relief.

The Agreement satisfies the immediate need of the NYCPSA for additional spectrum for public safety operations while preserving the authority of the Commission to allocate Channel 16 for Advanced Television (ATV) operations in New York City. Under the terms of the Agreement, NYCPSA would operate on Channel 16 on an interim basis until such time, if any (but in no event in less than five years), when that Channel is allotted in New York City for ATV, and a television broadcast licensee is ready to commence ATV operations. The Agreement includes standards and operating parameters intended to ensure that NYCPSA operations on Channel 16 would not result in prohibited interference to existing television broadcast licensees in the vicinity of New York City.

We request comment on the Agreement between NYCPSA and TBAIC. If the waiver is granted, are the conditions in the Agreement, including the described standards and operating parameters, sufficient to accommodate and protect other potentially affected users?

Further, we note that we recently placed on public notice a Request for Waiver submitted by the New York City Transit Police to use Channel 19 in New York for public safety operations; *see* DA 94-807, released July 21, 1994. In light of the request for Conditional Waiver by NYCPSA, we request comment on the necessity of granting the waiver request by the New York City Transit Police for Channel 19.

Parties desiring to file comments on the above issues, or on any other matters pertinent to the Conditional Request for Waiver, must reference DA 94-1459 on the cover page of their comments. Comments must be submitted by January 6, 1995. Reply comments must be submitted by January 20, 1995. Comments and reply comments should be submitted to the Secretary, Federal Communications Commission, 1919 M St. NW, Washington, D.C. 20554.

The Conditional Request for Waiver and related materials are available for inspection in the Frequency Allocation Branch, 2025 M St. NW, Room 7102, Washington, D.C. 20554. The Conditional Request and related material also may be purchased from the Commission's duplication contractor, International Transcription Service, Inc., 2100 M Street, NW, Suite 140, Washington DC 20036, (202) 857-3800. For further information, contact Ray LaForge, (202) 653-8117; internet: RLAFORGE FCC. GOV.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Report No. DS-1487 **Released: December 9, 1994**

DOMESTIC FIXED - SATELLITE SPACE STATION APPLICATIONS ACCEPTABLE FOR FILING; CUT-OFF ESTABLISHED FOR ADDITIONAL APPLICATIONS

The Commission has found, upon initial review, that the following applications for authority to construct, launch and operate space stations in the domestic Fixed-Satellite Service are acceptable for filing. The Commission reserves the right to return any of these applications if it is determined that an application is defective or not in conformance with Commission rules or policies.

ECHOSTAR SATELLITE CORPORATION

File Nos. 36-DSS-P/LA-94
37-DSS-P/LA-94

Application for authority to construct, launch and operate two Ku-band (12/14 GHz frequency bands) domestic fixed-satellites. Each satellite will provide sixteen high-power transponders, with selectable (on command) 54 MHz or 27 MHz channel bandwidths and a power output of 130 Watts per channel. EchoStar proposes a digital satellite transmission system that will provide FSS service to customers throughout the Continental United States (CONUS), and parts of southern Canada and northern Mexico. EchoStar proposes offer point-to-multipoint high definition television and multiple TV programs using digital compression techniques (which may allow for up to 200 channels to small receive antennas), digital audio stereo, and data and voice communications. The CONUS has a Peak E.I.R.P. of 52.54 dBW and an Edge of Coverage (EOC) E.I.R.P. of 49.04 dBW. The requested orbital locations are 76^0W.L. and 79^0W.L., located in the eastern portion of the high power arc. Echostar proposes to offer non-common carrier services.

HUGHES COMMUNICATIONS GALAXY, INC.

File No. 5-DSS-P/LA-95

Application for authority to construct, launch, and operate a C-band (4/6 GHz frequency bands) domestic fixed-satellite. The satellite, Galaxy IX, will carry 24 transponders, each with a bandwidth of 36 MHz and a nominal output power of 16 watts. Galaxy IX will have six spare traveling wave tube amplifiers ("TWTAs"), providing a design redundancy equal to that of Galaxy I-R and V-W. Twelve of the transponders will transmit in a horizontal polarization, and twelve transponders will transmit in a vertical polarization (perpendicular to the equatorial plane). The satellite will provide service to CONUS, Alaska, Hawaii, Puerto Rico, and the U.S. Virgin Islands. The nominal transmit E.I.R.P. is 37.0 dBW (CONUS coverage includes 1.0 dB output network loss). The requested orbital location is 123^0 W.L. HCG proposes to collocate Galaxy IX with HCG's existing Ku-band satellite, SBS-5. HCG seeks authority to make all of the transponders on Galaxy IX available on a non-common carrier basis.

AT&T CORPORATION

File No. 48-DSS-LA-94

Application for authority to launch and operate a hybrid C/Ku-band domestic fixed satellite. The satellite will provide 24 C-band transponders and 16 Ku-band transponders. The channel bandwidths will be 36 MHz for the C-band and 54 MHz for the Ku-band. The upper four Ku-band transponders, of either polarization, are convertible to two transponders, each with a bandwidth of 27 MHz. The C-band transponders are designed to operate at 12 watts, or up to 23 watts in the high-power mode. The Ku-band transponders are designed to operate at 60 watts, with twelve of the transponders capable of operating at 120 watts in high-power mode. All transponders will provide joint coverage of CONUS, Alaska, Hawaii, Puerto Rico and the U.S. Virgin Islands. For normal mode C-band operation the minimum EIRP is 35.2 dBW CONUS, 31.0 dBW Alaska, 33.0 dBW Hawaii and 31.0 Puerto Rico/Virgin Islands. For Ku-band operation the minimum EIRP is 44.3 dBW CONUS, 30.3 dBW Alaska, 44.3 dBW Hawaii and 44.3 Puerto Rico/Virgin Islands. The requested orbital location is 93^0 W.L. Applicant requests authority to operate all of the transponders on a non-common carrier basis

Comments or petitions regarding these applications must be filed no later than **February 15, 1995.** Opposition to petitions and replies to initial comments must be filed no later than **March 15, 1995**. Responses must be filed no later than **April 1, 1995**. All pleadings should be directed to the Secretary, Federal Communications Commission, Washington, D.C. 20554; Attention: Satellite Policy Branch.

Interested parties wishing to file domestic fixed-satellite applications to be considered concurrently with EchoStar's, HCG's and AT&T's must do so by **February 15, 1995**. Each applicant is required to file a concrete, comprehensive proposal that contains the information specified in Sections 25.114 and 25.140 of the Commission's rules. In addition, applications shall conform to the procedures set forth in Part 1, Subpart G of the Commission's rules -- Schedule of Statutory Charges and Procedures for Payment. Applications that fail to provide all required information by the cut-off date will be dismissed as unacceptable for filing.

Copies of the applications and pleadings will be available for inspection in the Public Reference Room at 2025 M Street, N.W., Room 6220, Washington, D.C., during its normal operating hours. When the International Reference Center at 2000 M Street, N.W., Washington D.C. is opened for operations in 1995, these files will be relocated to the new reference center. Copies may be obtained from ITS, Inc. 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. For further information, contact Kathleen Campbell or Michael A. McCoin at (202) 634-1624.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
December 14, 1994

Released: December 14, 1994

Mr. Robert J. McKee, Esq.
AT&T Corporation
Room 3245H1
295 North Maple Avenue
Basking Ridge, New Jersey 07920

Charles R. Naftalin
Koteen & Naftalin
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: *American Telephone and Telegraph Company v. Telephone Utilities Exchange Carrier Association,* File No. E-94-39

Dear Counselors:

This letter memorializes staff rulings issued during a telephone conference held in the above-referenced complaint proceeding on December 14, 1994. The conference was held to consider Telephone Utilities Exchange Carrier Association (TUECA's) motion to compel answers to interrogatories (Motion).[1]

Interrogatories 6 and 8 ask AT&T to describe whether and to what extent it plans to flow through any damages awarded in the instant proceeding to its end-user customers and to what extent customers would have received a rate reduction had TUECA not earned in excess of the Commission's prescribed rate of return. AT&T argues that the information requested in these interrogatories is not relevant to the complaint. AT&T also objects to these interrogatories on the basis that they erroneously assume that AT&T's interstate rates would have changed (or were required to have changed) in response to any change in TUECA's access rates.

Motion to Compel denied. In light of prior Commission rulings regarding the flow-through of damages awards, TUECA has failed to show that the requested information regarding AT&T's plans to flow through any damages awards to its end-user customers is relevant to our determination of the issues raised in this proceeding or is reasonably calculated to lead to the discovery of admissible evidence.

The parties resolved through stipulation interrogatories 1 through 4 and 9 through 11. AT&T agreed to provide the stipulation in its initial brief.

The parties also agreed that simultaneous briefs will be filed on **January 30, 1995** and that reply briefs may be filed not later than **February 13, 1995**. In their briefs, the parties will be expected to set forth clearly and concisely all legal and factual support, with appropriate citation to supporting authorities and materials, for their damages and offsets claims.[2] All supporting documentation or other evidentiary material should be clearly referenced and appended to the initial and/or reply briefs.

This letter ruling is issued pursuant to Sections 4(i) and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 208, and authority delegated by Sections 0.291 and 1.733(c) of the Commission's rules, 47 C.F.R. §§ 0.291, 1.733(c).

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints
and Investigations Branch
Common Carrier Bureau

[1] TUECA filed its Motion on June 27, 1994 after receiving American Telephone and Telegraph Company (AT&T's) responses and objections to TUECA's interrogatories on June 9, 1994. AT&T filed an opposition to TUECA's Motion on July 8, 1994.

[2] The parties are not precluded from addressing the issue of liability in their initial and reply briefs.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI CABLEVISION OF
NORTH CENTRAL KENTUCKY, INC.

Appeal of Local
Rate Order of City of
Mount Washington, KY

ORDER

Adopted: December 13, 1994; Released: December 14, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. TCI Cablevision of North Central Kentucky, Inc. ("TCI"), the franchisee in the above matter, filed on May 9, 1994 an Appeal of Local Cable Rate Order adopted on April 7, 1994 by its local franchising authority, the City of Mount Washington, Kentucky ("the City").[1] The Rate Order establishes a new regulated rate schedule for TCI's basic service tier rates and associated equipment.[2] Specifically, the City's Rate Order requires TCI to implement certain rate reductions and to issue refunds to subscribers, dating back to September 1, 1993.

2. In its review of TCI's Form 393, the City approved TCI's permitted rates for its basic service tier, but ordered TCI to keep its rates for converter boxes and remote controls at the current levels, rather than at the higher, maximum permitted levels.[3] TCI argues that because of this misapplication of the Commission's rate regulations, the City has improperly reduced TCI's regulated revenues by setting its rates for converter boxes and remote controls below the levels permitted under the benchmark regime and has imposed a refund liability that is greater than the level allowed under our rules.

II. DISCUSSION

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[4] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[5] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[6] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[7]

4. FCC Form 393 is the official form used by regulators to determine whether an operator's regulated rates for programming, equipment and installations were reasonable during the time period from September 1, 1993 until May 14, 1994.[8] Form 393 is divided into three separate, but interrelated parts. In Part II, the operator calculates its maximum permitted programming rates, while in Part III, the operator calculates its maximum permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the period of review.

5. The operator's maximum permitted rates are derived by completing Parts II and III of the Form 393, pursuant to which the operator calculates the actual aggregate revenues collected by the operator for regulated programming, equipment and installation, as of the initial date of regulation ("current rate") or as of September 30, 1992.[9] After calculating actual aggregate revenues, the operator converts those revenues to a per-channel rate, and then compares the per-channel figures to the applicable benchmark rate.

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[1] Along with its Appeal of Local Cable Rate Order, TCI also filed a Request for Emergency Stay on May 9, 1994. The City of Mount Washington has not filed an opposition to either the stay petition nor the appeal on the merits and the Commission's deadlines for receiving both filings have passed. Because we are resolving this dispute on the merits presented in the appeal, the petition for stay has been rendered moot.

[2] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[3] On the Cover Sheet (Part I) of its Form 393, TCI's maximum permitted rate for remote controls is listed as $0.69 per month, while its actual rate is listed as $0.30 per month. Likewise, TCI's maximum permitted rate for converter boxes is listed as $3.69 per month, while its actual rate is listed as $1.60 per month. The City set TCI's rates for remote controls and converter boxes at $0.30 and $1.60 per month, respectively.

[4] *See* 47 C.F.R. § 76.944.

[5] *See Report and Order and Further Notice of Proposed Rulemaking in MM Docket 92-266*, 8 FCC Rcd 5631, 5731 (released May 3, 1993) (*"Report and Order"*); *Third Order on Reconsideration in MM Docket 92-266*, FCC 94-40, slip op. at ¶ 81 (released March 30, 1994) (*"Third Recon. Order"*).

[6] *Id.*

[7] *Id.*

[8] To the extent that an operator has sought to take advantage of the refund deferral period available under the *Second Order on Reconsideration, Fourth Report an Order, and Fifth Notice of Proposed Rulemaking in MM Docket 92-266*, 9 FCC Rcd 4119, 4183-4185 (1994), the maximum permitted rates determined under Form 393 may also apply from May 15, 1994 until the date that the operator implemented its new rates, as determined under the Form 1200 series.

[9] An operator must calculate its rate in effect on September 30, 1992, only if its current rate is above the benchmark rate. If an operator's current rate is at or below the benchmark rate, it is not required to calculate its September 30, 1992 per-channel rate.

If an operator's current per-channel rate is below the applicable benchmark rate, then the operator's rate is deemed reasonable, but it must remain at its current level. If its current per-channel rate exceeds the benchmark rate, the operator must then compare its September 30, 1992 per-channel rate to the applicable benchmark rate. If its September 30, 1992 per-channel rate is above the benchmark rate, it must reduce this rate to the benchmark rate or by 10%, whichever reduction is less. The adjusted rate will be its maximum permitted rate for programming. Maximum permitted rates for equipment and installation are based on actual cost and are calculated in Part III of the Form 393. Equipment rates are derived from capital and maintenance costs per unit of equipment. Installation rates are derived from calculation of an hourly service charge and application of that charge to different types of installations. Under our regulations, the maximum permitted rates are deemed to be reasonable, as required by the 1992 CableAct.[10] Requiring cable operators to set all or some of their rates for programming, equipment or installation below their maximum permitted levels would force them to charge rates at levels below those specifically allowed under our rules.[11]

6. If a franchising authority does not dispute the bases for the figures presented in a cable operator's Form 393 or has not discovered any mathematical errors in the form, the franchising authority should then approve the operator's maximum permitted rates, as derived by the form. A franchising authority should not require the operator to set a particular rate for programming, equipment or installations at any rate less than its maximum permitted rate, even if its current or actual rate is below its maximum permitted rate. Instead, the franchising authority should allow the operator to charge up to its maximum permitted rates, as derived by Form 393.[12] In this proceeding, the City did not dispute either the validity of the figures used in TCI's Form 393 or the accuracy of the calculations in the form. Therefore, the City should allow TCI to charge its maximum permitted rates, as derived by the Form 393.

7. After setting the various regulated rates that an operator is permitted to charge on a prospective basis, a franchising authority should then determine if the operator is liable for any subscriber refunds. A refund liability can be imposed when an operator's actual charges exceed maximum permitted levels during the applicable period of review.[13] If an operator's aggregate revenues computed from its actual rates exceeded its revenues computed from its permitted rates during the period of review, the operator must refund the difference to subscribers.[14] If the operator's aggregate revenues computed from its permitted rates exceeded its aggregate revenues computed from its actual rates, the operator will not be required to issue any refunds for that period of review. In this proceeding, any refunds to be paid by TCI should be calculated based on this method.

8. While the Commission will sustain the decisions of franchising authorities if there is a reasonable basis for doing so, we expect franchising authorities to adhere to the mathematical principles underlying the benchmark methodology, particularly when calculating an operator's refund liability.[15] For instance, in this case, the City may not order TCI to set its equipment rates below maximum permitted levels. Further, the City must offset or reduce any refunds it may order by the difference between the actual equipment rates that TCI charged and the maximum permitted rates that it could have charged during the applicable period of review.[16] According to TCI's uncontested submission, the City has directed TCI to charge less than its maximum permitted levels for certain components of its regulated service and to issue refunds without regard to the fact that some rates are below maximum permitted levels. We are remanding this case to the City so that it can reconsider its ruling in a manner consistent with our findings.

9. Accordingly, IT IS ORDERED that TCI Cablevision's appeal of The City of Mount Washington's local Rate Order, regarding the issue of TCI Cablevision's permitted charges for converter boxes and remote controls and related refunds is REMANDED to the local franchising authority for resolution in accordance with the terms of this Order.

10. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[10] *See* Communications Act, § 623(b), 47 U.S.C. § 543(b).

[11] If a franchising authority required an operator to set its rates for equipment and installations below their maximum permitted levels, the operator could, in effect, be forced to provide equipment and installations at levels below actual cost.

[12] An operator is not required, however, to raise its rates to the maximum permitted level. An operator may voluntarily choose to charge less than the maximum permitted rate.

[13] *See* 47 C.F.R. § 76.942.

[14] *See Third Recon. Order* at ¶ ¶ 103-104 ("Although maximum permitted rates are always determined on an unbundled basis, *i.e.*, separately for program service and equipment, refund liability may stem from bundled rates. We conclude that the refund liability should be calculated based on the difference between old bundled rates and the sum of the new unbundled program service charge(s) and the new unbundled equipment charge(s).").

[15] *See Report and Order* at 5731; *Third Recon. Order* at ¶ 81.

[16] *See Third Recon. Order* at ¶ ¶ 103-104.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PANAMSAT CARRIER
SERVICES, INC.

Application for Authority Pursuant to Section 214 of the Communications Act, as Amended, to Establish and Operate Channels of Communication Between the United States and the PAS-1 Satellite for the Provision of International Private Line and Public Switched Services To and From Overseas Points

File No. I-T-C-93-236

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 23, 1994; Released: January 25, 1995

By the Chief, International Bureau:

I. INTRODUCTION

1. The above-captioned application requests the Commission to authorize PanAmSat Carrier Services, Inc. ("PCSI") under Section 214 of the Communications Act of 1934, as amended, and Section 63.01 of the Commission's Rules, to establish and operate channels of communication between satellite earth stations in the United States and the PAS-1 satellite.[1] PCSI requests authority to establish and operate up to one 512 kbps circuit to each international point listed in the Appendix for the provision of international private line services and public switched (voice and non-voice) services between these points and the United States. PCSI also requests authority to acquire and operate any necessary domestic connecting facilities. Based on our review of the application and the pleadings, we grant PCSI's request.

II. BACKGROUND

2. PCSI is a wholly-owned subsidiary of PanAmSat L.P. ("PAS"), which owns and operates a U.S. private international satellite system.[2] PAS's PAS-1 satellite serves the Atlantic Ocean Region. The Commission has authorized PAS to construct, launch and operate additional satellites that will comprise a global network.[3] PAS provides its services on a private, non-common carrier basis.

3. PCSI's application was filed on June 23, 1993, and was placed on public notice on June 30, 1993. In response to the notice, Comsat filed a Petition to Deny. PCSI filed an Opposition to the Petition to Deny, to which Comsat replied. PCSI subsequently filed a Response to Comsat's Reply.[4]

4. In its petition, Comsat states that PCSI's application is incomplete and insufficient because it does not adequately describe the proposed service and fails to identify the real parties-in-interest. Comsat argues that the application presents serious questions regarding PCSI's compliance with the alien ownership limitations in Section 310(b)(4) of the Communications Act.[5] Comsat urges the Commission to request further information regarding the nature of PCSI's proposed service and the real parties-in-interest. In the absence of such facts, Comsat argues, the Commission should conclude that the foreign ownership in PCSI's parent company exceeds the limits of Section 310(b)(4) and the application should be denied.[6]

5. In its opposition, PCSI states that Comsat's Petition to Deny should be dismissed summarily because it is based on the erroneous assumption that the foreign ownership restrictions contained in Section 310(b)(4) apply to Section 214 common carrier authorizations. PCSI notes that Section 310(b)(4) applies only to an award of a radio "license" and not to Section 214 "authorizations," as Comsat implies. In addition, PCSI states that the Commission's rules regarding Section 214 authorizations address foreign-carrier affiliation, not foreign ownership *per se*. PCSI certifies pursuant to Section 63.01 of the Commission's rules that is not affiliated with any foreign carriers.[7] In addition, PCSI states that even if it were affiliated with a foreign carrier, it would not be precluded from holding a Section 214 authorization, but would only be subject to dominant carrier regulation. PCSI states that there are a number of foreign-held entities that have or have held Section 214 authorizations.[8]

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[1] *See* PCSI Application at 1.

[2] The Managing General Partner of PAS is PanAmSat, Inc. ("PASI"), a U.S. corporation which is 100% owned by Rene Anselmo. The other general partner is Grupo Televisa, S.A. de C.V. ("Televisa"), a publicly-held Mexican media conglomerate controlled by Emilio Azcarraga. Affiliates of PASI and Televisa own 49% each of the limited partnership interest. *See Alpha Lyracom, d/b/a Pan American Satellite, Alpha Lyracom Space Communications, Inc., Cygnus Satellite Corp.*, 8 FCC Rcd 376 (1992). In February 1994, the Chief of the Common Carrier Bureau authorized the assignment of PAS's authorizations to PanAmSat Licensee Corp., a wholly-owned, non-common carrier subsidiary of PAS. *See PanAmSat*, 9 FCC Rcd 668 (1994).

[3] *See Pan American Satellite Corporation*, 101 F.C.C. 2d 1318 (1985). In addition to PAS-1, PAS currently operates another satellite, PAS-2, which also serves the Atlantic Ocean Region.

[4] On September 24, 1993, PCSI filed a motion for leave to file supplemental comments, in which it requested leave to file this response. To ensure a complete record, we grant PCSI's motion. In addition, presentations were filed by PCSI on June 3 and 14, 1993 and July 2, 1993.

[5] *See* 47 U.S.C. § 310(b)(4) (1994).

[6] *See* Comsat Petition to Deny at 6-7. Comsat argues that the total amount of foreign equity in PCSI's parent company exceeds Section 310(b)(4)'s twenty-five percent benchmark for alien capital stock ownership of the parent of a radio licensee. In addition, Comsat alleges that the presence of Televisa as a general partner of PAS, PCSI's parent company, contradicts Section 310(b)(4)'s restriction on alien officers.

[7] *See* PCSI Opposition to Comsat Petition to Deny at 1-2.

[8] *See id.* at 2-3.

6. In response, Comsat states that PCSI misconstrues its arguments. Comsat states that an application for Section 214 authority implicates the Section 310(b)(4) foreign-ownership restrictions where the Title II services will be provided using the radio licenses of a foreign-controlled Section 214 applicant.[9] Comsat appears to be concerned that PCSI intends to use its own common carrier earth stations.[10] Comsat notes that PCSI has not specified who will own the earth stations necessary to provide this service. Comsat argues that if PCSI, a common carrier, plans to use its own earth station facilities to provide service, Section 310(b)(4) will be implicated as a result of the foreign ownership interests in its parent, PAS. Comsat also repeats its request for further information about how PCSI will provide service.[11]

7. Responding to Comsat's concerns that PCSI will own its own earth stations, PCSI states that, consistent with Section 310(b)(4), it will not operate its own earth stations or otherwise hold or use any radio license to provide its common carrier services. Rather, it will obtain the necessary transmission facilities from third parties. PCSI states that Comsat's argument concerning the possible applicability of Section 310(b)(4) to services provided by common carriers holding radio station licenses is irrelevant. PCSI also notes that it could not become the licensee of a common carrier radio station without completing an FCC application for a common carrier radio license in which it would have to ask whether PCSI complies with Section 310(b)(4).[12]

III. DISCUSSION

8. As an initial matter, we find that PCSI has provided the information necessary to grant its Section 214 application. We disagree with Comsat's assertion that any additional information is necessary for the Commission to make its public interest finding pursuant to Section 214. PCSI has sufficiently described the services it seeks to provide. It has represented that it will use authorized common carrier earth stations, and will not itself own or operate any such earth stations. PCSI also has adequately identified itself as the real party-in-interest. Our Rules do not require any further information from the applicant or inquiry by the Commission.

9. We further find that there is no basis for concluding that Section 310(b)(4) is applicable to PCSI's application. Section 310(b) applies to common carrier radio licenses. PCSI's original application did request authority to provide services using any existing or future earth stations that are owned or leased by PCSI or its affiliates. As Comsat notes, if PCSI plans to use its own earth station facilities, Section 310(b)(4) will be implicated because of the foreign ownership of PCSI's parent. In its response of September 24, 1993, however, PCSI states that it will not operate its own earth stations or otherwise hold or use any radio license to provide its common carrier services. Rather, it will obtain the necessary transmission facilities from third parties. In any event, as PCSI correctly argues, the Commission's Rules require PCSI to seek specific Commission authorization to become a common carrier radio licensee. Given that PCSI has not sought a common carrier radio license, we find that Section 310(b)(4) is not applicable to PCSI's application.[13] Comsat has therefore failed to demonstrate, as required by Section 63.52(c) of our rules, that a grant of PCSI's application would be *prima facie* inconsistent with the public interest, convenience and necessity. Accordingly, we deny Comsat's Petition.

10. Finally, we note that PCSI will be obtaining circuits directly from its parent, PAS. We emphasize, however, that any proposed circuit additions by PCSI on any non-common carrier satellite, including PAS-1, must be authorized by the Commission through the Section 214 application process.[14] The Commission also retains sufficient authority to request any additional information from PCSI, including the cost and contractual terms and conditions governing the lease and operation of PAS-1 capacity for PCSI's common carrier services.

11. Upon consideration of the application and the pleadings filed in response thereto, we find that the grant of PCSI's application is in the public interest. Therefore, IT IS HEREBY CERTIFIED, pursuant to 47 U.S.C. § 214, that the present and future public convenience and necessity require the provision of private line and public switched service by PCSI between the United States and the points listed in the Appendix via the PAS-1 satellite.

12. Accordingly, IT IS ORDERED that application File No. I-T-C-93-236 IS GRANTED and PanAmSat Carrier Services, Inc. (PCSI) is authorized to:

a. establish and operate the satellite capacity specified in the Appendix between appropriately licensed U.S. earth stations and the PAS-1 satellite, connecting with similar circuits furnished by its correspondents between the satellite and the earth stations in countries listed in the Appendix;

b. lease capacity in U.S. earth stations authorized to communicate with the PAS-1 satellite;

c. lease and operate necessary connecting facilities in the United States; and

d. use the facilities authorized herein for the provision of private line and public switched (voice and non-voice) services between the United States and the points specified in the Appendix, subject to any restrictions set forth in this order or any other Commission order.

13. IT IS FURTHER ORDERED that the applicant shall file with the Commission copies of any operating agreements entered into with its foreign correspondents within

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[9] *See* Comsat Reply to PCSI Opposition to Petition to Deny at 1-2 (citing *Teleport Transmission Holdings, Inc.*, 8 FCC Rcd 3063 (1993)).

[10] Comsat, however, does not appear to oppose PCSI's use of PAS's earth stations or satellite.

[11] *See id.* at 1-4.

[12] *See* PCSI Response to Comsat Reply to Opposition at 1-2.

[13] PCSI has certified pursuant to Section 63.01 of the Commission's rules that it is not affiliated with any foreign carrier. Therefore, we will regulate PCSI as a nondominant carrier.

[14] All U.S. international common carriers are required to file Section 214 applications to acquire capacity from any private cable or satellite. *See International Competitive Carrier Policies*, 102 F.C.C.2d 812, 845 (1985), *recon. denied*, 60 R.R.2d 1435 (1986).

30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. § 43.51.

14. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. § 203 and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

15. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

16. IT IS FURTHER ORDERED that the number of circuits authorized herein for the provision of services via separate satellite systems is subject to limitations on the number of circuits specified under the separate systems policy and applicable consultations under Article XIV(d) of the INTELSAT Agreement.[15]

17. IT IS FURTHER ORDERED that PCSI is authorized to provide to the countries listed in the Appendix only those services for which the Article XIV(d) consultation with INTELSAT has been completed.

18. IT IS FURTHER ORDERED that neither PCSI nor any persons or companies directly or indirectly controlling or controlled by PCSI, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which PCSI or any persons or companies controlling or controlled by PCSI are parties.

19. IT IS FURTHER ORDERED that our authorization of PCSI to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and the countries listed in the Appendix – that is, private lines which originate in the United States and terminate in one of the countries listed in the Appendix or which originate in one of the countries listed in the Appendix and terminate in the United States. In addition, PCSI may not – and PCSI's tariff must state that its customers may not – interconnect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international switched basic services, unless authorized to do so by the Commission upon a finding that the destination country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *Petition for Reconsideration pending*.

20. IT IS FURTHER ORDERED that the applicant shall file a separate Section 214 application for any circuits in addition to those herein authorized that it seeks to operate via PAS-1 or any other non-common carrier satellite or cable facility.

21. IT IS FURTHER ORDERED that the applicant is authorized to provide international services specified above using earth stations in the United States authorized to communicate with the above-mentioned satellite. Should the applicant wish to construct its own earth station facilities to provide these services, an appropriate application under Title III of the Communications Act will be required.

22. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

APPENDIX

PCSI is authorized to establish and operate on the PAS-1 satellite system up to one 512 kbps circuit for the provision of service between the United States and the countries listed below.

Albania	Jamaica
Anguilla	Kazakhstan
Antigua	Kyrgyzstan
Argentina	Latvia
Armenia	Lithuania
Aruba	Luxembourg
Austria	Mexico
Azerbaijan	Moldova
Bahamas	Monaco
Barbados	Montserrat
Barbuda	Netherlands
Belarus	Netherlands Antilles
Belgium	Nicaragua
Belize	Panama
Bermuda	Paraguay
Bolivia	Peru
Brazil	Poland
British Virgin Islands	Portugal
Bulgaria	Portugal-Canada
Canada	Romania
Cayman Islands	Russian Federation
Chile	Spain
Colombia	St. Christopher (St. Kitts) & Nevis
Costa Rica	St. Lucia

[15] Currently, PAS is authorized to interconnect with the public switched network up to 1,250 64 kbps circuits per satellite, including PAS-1. *See Alpha Lyracom d/b/a Pan American Satellite*, 9 FCC Rcd 1282, 1284 (1994).

Czechoslovakia
Denmark
Dominica
Dominican Republic
Ecuador
Estonia
France
Georgia
Germany
Greece
Grenada
Guatemala
Guyana
Haiti
Honduras
Hungary
Ireland
Italy
St. Vincent & the Grenadines
Suriname
Sweden
Switzerland
Tajikistan
Trinidad & Tobago
Turkmenistan
Turks & Caicos Is.
Ukraine
United Kingdom
Uruguay
Uzbekistan
Venezuela
Yugoslavia

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone & Telegraph Company — File No. USP-94-W-210

Petition For Waiver of the International Settlements Policy for a Change in the Accounting Rate for Switched Voice Service with Canada

ORDER AND AUTHORIZATION

Adopted: January 11, 1995; Released: January 25, 1995

By the Chief, Telecommunications Division

I. INTRODUCTION

1. American Telephone and Telegraph Company (AT&T) has filed a petition for waiver of the Commission's International Settlements Policy (ISP)[1] to introduce and establish an accounting rate for International 800 service (I-800) between the United States and its correspondent in Canada, Unitel Communications ("Unitel").[2] The Commission staff sent a letter to AT&T stating that it must await formal staff action before the proposed accounting rate could be implemented.[3] In this decision, we approve the accounting rate for I-800 service between AT&T in the United States and Unitel in Canada.[4]

II. SUMMARY OF WAIVER REQUEST

2. AT&T seeks to introduce and establish an accounting rate for I-800 service with Unitel of $0.26 per minute during the "Full" period and $0.22 per minute during the "Reduced" period,[5] and to include a surcharge of $0.005 for each such message. The effective date would be January 29, 1994 and coincide with the initiation of I-800 service between AT&T in the United States and Unitel in Canada. The accounting rate would be divided equally between AT&T and Unitel and the surcharge would be paid to the non-billing administration. No opposition to the proposal has been filed.

III. DISCUSSION

3. In its *Phase I Report and Order*, the Commission delegated authority to the Common Carrier Bureau[6] "to consider, on a case-by-case basis, granting ISP waiver requests that include a lower, more economically efficient, cost-based, international accounting rate when supported by sound analysis of the benefits that will result from the implementation of that rate."[7] The Commission stated that the Bureau should approve accounting rate changes if the changes result in a) a more cost-based accounting rate, and b) either a commitment to lower calling prices or some otherpublic interest benefit.[8] In this context, we must decide under the ISP whether the proposed accounting rate is in the public interest. Specifically, we must determine whether a surcharge on I-800 service between the United States and Canada, in addition to the basic settlement payment that is owed for each minute of service, is justified to compensate a carrier for the cost it incurs to originate an I-800 call and, whether the particular surcharge proposed by AT&T in its petition for waiver is a reasonable one if we determine that a surcharge is justified.

4. With this proposal, AT&T would initiate I-800 service with Unitel. The two carriers have an agreement to provide switched telephone service at an accounting rate of $0.26 per minute during the "Full" period and $0.22 per minute during the "Reduced" period but that agreement does not include I-800 service. AT&T, however, has an agreement with Stentor, another Canadian carrier providing service with U.S. carriers, to provide I-800 service and the accounting rate that is in effect is $0.36 per minute during the "Full" period and $0.30 per minute during the "Reduced" period. There is no surcharge for I-800 service provided by AT&T and Stentor.

5. The accounting rate for service between the United States and Canada, while probably higher than the average cost and surely greater than the incremental cost, is the lowest U.S. accounting rate. This proposal would bring the accounting rate for I-800 service even closer to the cost of service, thus promoting our goal of lower, more cost-based accounting rates. We are, therefore, encouraged by the proposal to reduce the accounting rate per minute for I-800 service below the rate that is currently used to settle accounts for I-800 service between the United States and Canada. In addition, the proposal incorporates the notion that costs are lower during off-peak hours than during the peak period, thereby advancing the achievement of

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[1] The ISP requires uniform settlement rates, accounting rates, and division of tolls for U.S. international carriers on parallel routes. *See Implementation and Scope of Uniform Settlements Policy for Parallel International Communications Routes*, 51 Fed. Reg. 4736 (1986) (*ISP Order); Reconsideration*, 2 FCC Rcd 1118 (1987); *Further Reconsideration*, 3 FCC Rcd 1614 (1988). In 1991, the Commission reformed the ISP to encourage and facilitate accounting rate reductions by U.S. carriers. *See Regulation of International Accounting Rates*, 6 FCC Rcd 3553 (1991) (*Phase I Report and Order); Reconsideration*, 7 FCC Rcd 8049 (1992).

[2] AT&T, Petition for Waiver, USP-94-W-210, May 11, 1994.

[3] *See* Letter from George S. Li to Elaine R. McHale, AT&T, dated May 24, 1994.

[4] The Canadian Radio-television and Telecommunications Commission (CRTC) issued a decision approving Unitel's application for the accounting rate for I-800 service with AT&T. *See Order*, Telecom Order CRTC 94-848, Ottawa, July 22, 1994.

[5] The "Full" period is in effect Monday through Friday from 8 A.M. to 6 P.M.; the "Reduced" period is in effect Monday through Friday from 6 P.M. through 8 A.M., all day Saturday, Sunday, December 25th, and January 1st.

[6] This authority has been transferred to the International Bureau. *See Amendment of Parts 0, 1, 25, 64, and 73 of the Commission's Rules to Reflect a Reorganization Establishing the International Bureau*, 9 FCC Rcd 7050 (1994).

[7] *Regulation of International Accounting Rates*, 6 FCC 3552 (1991) at 3554.

[8] *Id.*

economically efficient accounting rates. We expect that the combination of a lower I-800 accounting rate and the peak/off-peak accounting rate structure will result in net settlement payments to Canada being lower than they would have been otherwise, particularly if, as we believe, the reduction encourages others to adopt a similar I-800 accounting rate with U.S. carriers. We are also reassured by the step to bring the rate per minute for I-800 service into alignment with the accounting rates per minute for IMTS between the United States and Canada because it is consistent with our policy to discourage the introduction of higher, non-uniform, international accounting rates that exceed the cost of service.[9] In short, we approve AT&T's proposal to introduce an accounting rate per minute for I-800 service with Unitel at the same level as its IMTS accounting rate.

6. We now address that portion of the waiver proposing to include a surcharge for each I-800 message that would be paid to the non-billing administration. Several features of I-800 service between the United States and Canada distinguish it from I-800 service with other countries and from other IMTS calls. Unlike most international calls that originate and are billed in the same country, an I-800 call from Canada to the United States originates in Canada but is billed in the United States. The U.S. carrier bills its 800 customer in the United States for the call and owes a settlement payment to its Canadian correspondent for that call. Since several carriers provide 800 service in the United States and Canada, the local exchange carrier (LEC) in the country where the 800 call originates needs to identify the correct interexchange carrier (IXC) in that country to direct an 800 call to,[10] which then identifies the call as an international call and routes it to the international IXC in the other country serving the 800 customer.

7. A comprehensive data base with information about 800 customers in the United States and Canada enables LECs in both countries to identify the appropriate IXCs in Canada and the United States in order to match carriers with their customers. The data base must be updated regularly because a customer can shift its 800 business from one carrier to another carrier but retain the same 800 number after the change. This is referred to as "portability." It is, therefore, necessary to keep track of customers who switch their 800 service from one carrier to another carrier. Thus, when an 800 call originates in either Canada or the United States, the LEC that receives the call queries the data base to ascertain the international IXC who serves the 800 customer in the country where the call originates. Then the call is routed to the appropriate international IXC in the other country and on to the 800 customer for completion.

8. An LEC that originates an 800 call in the United States or Canada charges the IXC in the country where the call originates a basic access rate for the service it provides based on rates approved by federal regulatory authorities. In the United States, the Commission approved the LECs' 800 data base access tariffs,[11] containing the data base access service rates of U.S. LECs for 800 calls in the United States.[12] The Commission found the industry mean rate to be $0.0044 per query with a standard deviation of $0.0023 per query.[13] AT&T states in its petition for waiver that the authorized tariff rates of Bell Operating Companies and independent companies for data base access service range from $0.002 to $0.009 per query.

9. AT&T also states that the CRTC authorized Canadian LECs to charge Canadian IXCs Canada a rate of $C0.007 [14] per message for the 800 data base access service.[15]

10. The surcharge for each I-800 call would enable AT&T and Unitel to recover the charge each carrier is required to pay LECs for the service they provide to originate I-800 calls between the United States and Canada. Specifically, the surcharge would allow the non-billing correspondent to recover the 800 data base access charge it pays to the LEC by receiving an additional amount in the settlement payment from the carrier that bills its customer for an I-800 call. In this way, the data access charge for I-800 calls would be shifted from the international carrier in the country where the call originates to the international carrier in the country where the call is billed.

11. The proposed surcharge represents a discrete cost element for I-800 service between Canada and the United States resulting from changes in the way 800 service is provided in both countries, measures taken in response to these developments, and the fact that regulatory bodies in both countries have authorized their LECs to charge the international IXCs for the service the LECs provide. This proposal is unique to I-800 service between the United States and Canada and the surcharge is limited to such service. The surcharge proposed by AT&T, $0.005 per message, is slightly higher than the industry mean average data base access rate computed by the Commission for each data base query, $0.004 per query, but well within the threshold rate of $0.0067 per query we determined to be a reasonable rate for U.S. LECs during an interim period while the Commission conducts further investigation. We also recognize that an accounting rate is the result of negotiations between two carriers and, in the instant case, the proposed surcharge is approximately equal to the rate, perhaps somewhat lower depending on the exchange rate, Canadian LECs are authorized by the CRTC to charge for the service. Thus, we find the surcharge for I-800 service provided by AT&T and Unitel to be a reasonable rate that reflects new conditions of supply between Canada and the United States for this service classification.

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[9] *See American Telephone and Telegraph Company and MCI Communications Corporation*, 5 FCC Rcd 4618 (1990).

[10] This carrier identification is not necessary in other countries like the United Kingdom where one carrier, British Telecommunications, uses the 800 prefix for such calls and the other carrier, Mercury, uses the 500 prefix for such calls.

[11] *See Bell Operating Companies' Tariff for the 800 Service Management System, Tariff F.C.C. No. 1 and 800 Data Base Access Tariffs*, 8 FCC Rcd 3242 (1993).

[12] The tariffs contain a data base query rate, which is a base rate for an 800 call, and vertical feature rates for a range of additional service options that are offered by the LECs. The rates vary from LEC to LEC.

[13] *See Bell Operating Companies Tariffs for 800 Service* at 3244. The rates of some carriers were partially suspended pending further investigation of their reasonableness.

[14] The charge in Canada is equal to approximately $0.005 at the prevailing exchange rate of $1.00=$C1.4085.

[15] *See Ex Parte Pleading* from Stephen C. Garavito, AT&T to the Commission, December 20, 1994.

IV. CONCLUSION

12. We conclude that the accounting rate per minute for I-800 service proposed by AT&T is a reduction in the existing rate that will bring that rate closer to the cost of providing I-800 service between the United States and Canada, and it also brings the accounting rate for that service classification into alignment with the accounting rate for IMTS. The accounting rate for service between the United States and Canada is the lowest rate in effect for U.S. carriers and well below the benchmark ranges we established to guide U.S. carriers in their negotiations with foreign administrations. Therefore, the I-800 rate proposed by AT&T represents yet another step toward the achievement of more cost-based, economically efficient, non-discriminatory accounting rates. The lower accounting rate will result in net settlement payments to Canada being lower than they would have been at the current accounting rate. The alignment of the I-800 accounting rate with the rate for other IMTS classifications is also an important step in this direction because, as we noted in a recent decision concerning accounting rates, we have found no reason to distinguish I-800 accounting rates from other IMTS accounting rates.[16]

13. We also conclude that the proposal to impose a surcharge of $0.005 per message for each I-800 call is a reasonable cost-based measure which reflects the feature of providing I-800 service between the United States and Canada. We believe it is reasonable to allow AT&T and Unitel to recover charges that are based explicitly on the costs they incur on behalf of their correspondent to provide I-800 service, costs which are incurred as a necessary part of providing the service. We have authorized LECs in the United States to charge IXCs for this service and note that the CRTC has also approved similar charges for service rendered by LECs in Canada. Moreover, the surcharge of $0.005 per message approximates an industry mean rate for data base query service provided by LECs in the United States and, therefore, is a reasonable rate.

V. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED that, AT&T's petition, File No. USP-94-210, for a waiver of the Commission's ISP to permit the proposed change in the accounting rate with Unitel in Canada is GRANTED, and AT&T is authorized to implement the proposed accounting rate for I-800 service, including a surcharge for data base query service provided by LECs.

15. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (*see* 47 C.F.R. Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

[16] *See Memorandum Opinion, Order and Authorization*, DA 94-1260, November 14, 1994.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Release Date: January 25, 1995

ALASKA TELEPHONE COMPANY FILE A PETITION FOR WAIVER OF THE DEFINITION OF "STUDY AREA" CONTAINED IN PART 36, APPENDIX-GLOSSARY OF THE COMMISSION'S RULES AAD 95-1

Comment Date: February 27, 1995
Reply Date: March 13, 1995

On December 29, 1994, the Alaska Telephone Company ("Alaska Tel.") filed a petition for waiver of the definition of "Study Area" as set forth in Part 36, Appendix-Glossary of the Commission's rules. This waiver would allow Alaska Tel. to reflect the changes in its study area boundaries that would result from the incorporation of the previously unserved village of Healy Lake into its existing Alaska study area. Alaska Tel. states that the Alaska Public Utilities Commission has approved its request to provide service to those subscribers.

Interested parties may file comments on this petition on or before **February 27, 1995**, and reply comments on or before **March 13, 1995**, with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Comments and reply comments should also reference AAD 95-1. Four (4) copies should also be sent to Adrian Wright, Cost Analysis Branch, Accounting and audits Division, Common Carrier Bureau, Room 812, 2000 L Street, N.W., Washington, D.C. 20554, and one (1) copy should be sent to the Commission's contractor for public service record duplication: International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition may be obtained from the Accounting and Audits Division's public reference room, Room 812, 2000 L Street, N.W., Washington, D.C. Copies are also available from ITS at (202) 857-3800.

We will treat this proceeding as non-restricted for the purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§ 1.1200-1.1206. However, if this waiver petition is opposed, it will be treated as a restricted proceeding under the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§ 1.1208-1.1216. For further information contact Adrian Wright at (202) 418-0830.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Time Warner Cable CSR-4115-A
Albany, New York et al.

For Modification of the Albany-
Schenectady-Troy, New York ADI

Complaint of Cornerstone Television, CSR-4149-M
Inc. against Time Warner Cable

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: January 17, 1995; Released: January 25, 1995

By the Cable Services Bureau:

INTRODUCTION

1. On October 5, 1993, Time Warner Cable ("Time Warner") filed the above-captioned petition for special relief (CSR-4115-A) seeking to modify the Albany-Schenectady-Troy, New York Area of Dominant Influence (ADI) relative to Television Broadcast Station WOCD (Ind., Ch. 55), Amsterdam, New York. Specifically, Time Warner requests that the communities served by its Albany, New York cable system[1] be excluded from WOCD's television market, which is considered part of the Albany ADI, for the purpose of the cable television mandatory broadcast signal carriage rules. Subsequently, on November 3, 1993, a petition on behalf of Cornerstone Television, Inc., licensee of WOCD, (CSR-4149-M) was filed against Time Warner for its failure to add WOCD and seeking immediate carriage on the system. Oppositions and replies to both petitions have been filed. In light of the fact that the issues in these separate pleadings are related, they will be dealt with simultaneously herein.

BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ["1992 Cable Act"][2] and implementing rules adopted by the Commission in its *Report and Order in MM Docket 92-259*,[3] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[4] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[5]

3. This section of the 1992 Cable Act also provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communitiesfrom such station's television market to better effectuate the purposes of this section.

In considering such requests, the Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as -
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[6]

4. The legislative history of this provision indicates that:

> The provisions of [this subsection] reflect a recognition that the Commission may conclude that a community within a station's ADI may be so far removed from the station that it cannot be deemed part of the station's market. It is not the Committee's intention

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[1] In addition to Albany, New York, Time Warner's system serves the communities of Colonie (town), Colonie Village, Guilderland, Menands, Watervliet, Green Island, Altamont, Knox, Berne and Wright, New York.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] 8 FCC Rcd 2965, 2976-2977 (1993).

[4] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[5] Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. For a more complete description of how counties are allocated, *see* Arbitron's *Description of Methodology*.

[6] 47 U.S.C. §534(h)(1)(C)(ii). As Congress recognized, "[t]hese factors are not intended to be exclusive . . . ." H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

that these provisions be used by cable systems to manipulate their carriage obligations to avoid compliance with the objectives of this section. Further, this section is not intended to permit a cable system to discriminate among several stations licensed to the same community. Unless a cable system can point to particularized evidence that its community is not part of one station's market, it should not be permitted to single out individual stations serving the same area and request that the cable system's community be deleted from the station's television market.[7]

5. The Commission provided guidance in *MM Docket 92-259, supra,* to aid decision making in these matters, as follows:

> For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.,* rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[8]

6. In adopting rules to implement this provision, the Commission indicated that changes requested should be considered on a community-by-community basis rather than on a county-by-county basis and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[9] The rules further provide, in accordance with the requirements of the Act, that a station not be deleted from carriage during the pendency of an ADI change request.[10]

MODIFICATION ARGUMENTS

7. The communities here in question are all in Albany County, New York, which is located within the Albany-Schenectady-Troy, New York ADI. Amsterdam, New York, WOCD's city of license, is considered to be a part of the same ADI and is approximately 26 miles from the communities served by Time Warner.

8. In support of its petition, Time Warner states that while technically Amsterdam is considered to be part of the same ADI as Albany, it is not considered part of the same economic market. Time Warner notes that historically WOCD has never been carried on its Albany system and infers that this choice reflects a lack of desire by its subscribers for WOCD's programming. While Time Warner concedes that WOCD's predicted Grade B contour encompasses the Albany area, it argues that signal strength tests demonstrate that WOCD does not provide a good quality signal to the system headend.[11] Moreover, WOCD broadcasts religious programming 24 hours a day which does not qualify as local news or public affairs programming. Time Warner contends that the local Albany stations already provide extensive local news and events, as well as religious programming comparable to that of WOCD. Finally, Time Warner points out that WOCD's viewership ratings were so low that the 1993 Nielsen Daypart for the Albany ADI did not even report them.[12] The station is also not considered to be significantly viewed in any county where Time Warner's system operates.

9. In response, WOCD states that, as discussed more fully in its must-carry complaint, its signal is clearly viewable, but even if it were not, it has made adequate provision to provide a good quality signal. While it is predominantly a religious station, WOCD maintains that its programming is broader in appeal than Time Warner allows. It points out that many of its programs are focused on entertainment, discussion, news and instruction. Significant portions of this programming, including public affairs, are even locally produced and directed specifically to the Albany area.[13] Indeed, WOCD argues, over a 15-month period, it received correspondence and donations from 148 viewers in the Albany area,[14] a figure which clearly demonstrates that its signal is viewable and of interest to Albany residents. This is particularly important since other than the Family Channel (which WOCD indicates is no longer considered a religious network), Time Warner's system is devoid of religious-oriented programming. Further, WOCD argues that the fact that it has not previously been carried by Time Warner is not an issue for a station which is part of the same market. In any event, it avers that the 1992 Cable Act was designed to override instances of carriage discrimination. Finally, WOCD states that it is not yet represented by Nielsen because it only went on the air in the latter part of 1992, too soon for its survey data to be available.

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[7] H.R. Rep. 102-628, 102d Cong., 2d Sess. 97-98 (1992).
[8] *MM Docket No. 92-259,* 8 FCC Rcd at 2977.
[9] *MM Docket 92-259,* 8 FCC Rcd at 2977, 2977 n.139.
[10] 47 C.F.R. §76.59.
[11] Time Warner's conducted a signal strength test on April 20, 1993, using a Hewlett Packard Spectrum Analyzer, Model No. HP 8593A and an Archer 15-1655 Antenna at 25 feet. A second test conducted on May 11, 1993 does not indicate the equipment used.
[12] A review indicates that ratings were also not reported by Arbitron Ratings Company for the same period.
[13] In an exhibit purported to be from *TV Guide* for the week of November 1-7, 1993, WOCD indicates that on a weekly basis it provides 5 hours of locally-produced religious programs, 7 hours of local programming and 7 hours of non-news local programming for the Albany area.
[14] Out of a total of 148, 42 were actual donors.

10. Time Warner states in reply that WOCD completely misreads the Cable Act. Lack of historical carriage is relevant and Time Warner was well within its rights to deny WOCD prior carriage, especially considering that the must carry rules were twice struck down during WOCD's on-air history. Moreover, WOCD's contention that it should be carried more on the basis of its religious content than its local nature is a violation of the First Amendment. In addition, while WOCD argues that it provides a significant amount of local programming it merely attaches an undocumented chart as proof. Finally, Time Warner argues that if one looks at the local viewership WOCD claims to have, the ratio to that of the overall number of subscribers would be far too small to take into account.

DISCUSSION

11. With regard to the first criteria which deals with historic carriage on a cable system, we note that the 1992 Cable Act was adopted in part to cure past discriminatory signal carriage practices. *47 U.S.C. 534* Where, as is the case here, a petitioner seeks to delete a station from a relevant ADI with respect to a cable system, we believe that failure to establish historic carriage should not be given great weight. While it is true that there is no history of WOCD's carriage on Time Warner's system, we find that other factors outweigh this argument: 1) WOCD's transmitter is located only 26 miles from Time Warner's headend and its predicted Grade A contour encompasses the system communities at almost twice that distance at 47.6 miles. While Time Warner argues that 26 miles is a considerable distance, we note that in the Commission's decision in *RKZ Television, Inc.*, 8 FCC Rcd 8008 (1993), the petitioner relied on exactly the same distance to demonstrate why certain communities should be added to a particular station's ADI. 2) Under its current ownership, WOCD is a relatively new station which began operation on May 8, 1992. Although Time Warner relies on the fact that A.C. Nielsen failed to report WOCD's ratings and that WOCD is not significantly viewed in the counties it serves, we disagree as to such factors' importance in this instance. As noted in paragraph 5 above, viewing patterns and/or significantly viewed surveys to be relied upon in ADI requests are ideally to be conducted on a community-by-community basis. The methodology inherent in such surveys is considerably stricter and a better indication of actual viewing patterns in individual communities. In any case, even when we accept county-wide surveys, it should be taken into account that stations can take up to three years to establish their viewing patterns. That is why §76.54 of our rules allows viewership data from the first three years of operation. Since WOCD went on the air on May 8, 1992, it could use data through May 8, 1995 to establish significantly-viewed status in particular counties. 3) While the correspondence and donations cited by WOCD are admittedly not a large percentage of the Albany area population, it is apparent nevertheless that there is some interest in and reception of WOCD in the Albany area. This interest would surely increase with access to a broader range of viewers as a result of cable carriage. In addition, we are satisfied that WOCD is providing a reasonable amount of locally-oriented programming in its weekly schedule.

12. Furthermore, because WOCD is a specialty station in that it broadcasts primarily religious programming, the Commission has previously recognized that religious stations, such as WOCD, once referred to as specialty stations, are capable of "offer[ing] desirable diversity of programming. . . ," yet typically attract limited audiences. *First Report and Order in Docket 20553,* 58 FCC 2d 442, 452 (1976), *recon. denied,* 60 FCC 2d 661 (1976). We continue to believe, as we did then, that the fact that such stations attract limited audiences must be taken into account in determining the equities concerning such stations' rights to cable carriage. Consequently, based upon the above, we find that Time Warner has failed to carry its burden of establishing that the public interest would be served by deleting WOCD from the Albany-Schenectady-Troy ADI as it relates to carriage on Time Warner's cable system at issue.

MUST CARRY ARGUMENTS

13. In its must carry complaint, WOCD emphasizes that it is a local commercial station licensed to a community located within the Albany-Schenectady-Troy, New York ADI and that it provides a more than adequate signal to the Time Warner headend. Indeed, it states that it is inconceivable that a 5 MW transmitter, located 26 air miles from Albany, would fail to provide the required -45 dBm signal. WOCD points out that the two tests that Time Warner performed[15] not only were conducted a mere 25 feet above ground level, but have questionable methodology. WOCD maintains that in neither test did Time Warner take into account that the treeline is at 65 feet or that the minimum level in this instance at which its signal should be measured is 70 feet. Even when confronted with this fact, WOCD avers that Time Warner has been unwilling to conduct new tests at the appropriate height even though WOCD is willing to provide, at its own expense, the appropriate equipment to do so. WOCD therefore requests that the Commission order Time Warner to carry its signal within the standard 45 days or, in the alternative, require Time Warner to conduct signal strength tests consistent with Commission criteria and add WOCD when its proper signal strength is demonstrated.

14. In its opposition to the must carry complaint, Time Warner reiterates the arguments it raised in its ADI petition. It maintains that, based on its signal quality tests, WOCD's signal is clearly substandard and it is therefore not entitled to carriage. In any event, Time Warner feels that it is under no obligation to carry WOCD during the pendency of its ADI modification request and it argues that WOCD's complaint is inappropriate and premature and should be dismissed. Time Warner concludes that to order it to carry WOCD prior to action on its ADI petition would cause severe disruption to its system, especially should that petition be granted.

15. WOCD's reply states that Time Warner completely ignores the issues raised in the must carry complaint and inappropriately seeks to intertwine that complaint with its

[15] Time Warner's first test conducted on April 20, 1993 reported a signal level measurement of -73.15 dBm (28.15 dBm below the threshold). Its second test on May 11, 1993, after WOCD raised its power level from a temporary 20% to 70%, indicated a signal level measurement of -66.15 dBm (21.15 dBm below the threshold).

own separately-filed ADI petition. Moreover, it continues, Time Warner has failed to address or even meet the Commission's previously enunciated signal quality measurement standards and has therefore not met its burden of proof. WOCD concedes that the Commission's engineering criteria does not specifically discuss the height of such measurements, but it argues that "sound engineering measurement practices" should require that any prudent cable operator measure a signal at the level at which it would place a receiving antenna. A virtually ground-level measurement, such as that of Time Warner at 25 feet, is totally unacceptable.

DISCUSSION

16. First, with respect to the standard to be used to determine what constitutes a "good quality" signal, we note that §614(h)(1)(b)(iii) of the Communications Act of 1934, as amended, and the 1992 Cable Act provide the requisite signal levels for VHF and UHF commercial stations at a cable system's headend. To establish the availability of a VHF commercial station's signal, a standard of -49 dBm was set at a cable system's headend while a standard of -45 dBm was established for UHF commercial stations' signals. In this instance, Time Warner has determined WOCD's signal strength to be below the requisite level for a UHF commercial station. However, we find that the engineering data it used to support its determination is unacceptable. Generally, if the test results are less than -51 dBm for a UHF station, we believe that at least four readings must be taken over a two-hour period. Where the initial readings are between -51 dBm and -45 dBm, inclusive, we believe that the readings should be taken over a 24-hour period with measurements not more than four hours apart to establish reliable test results. This is the best evidence of the availability of a station at a subject system headend.

17. In addition to the information required by our rules to be furnished to the affected station when there is a dispute over signal level measurements, cable operators are expected to employ sound engineering measurement practices. Therefore, signal strength surveys should, at a minimum, include the following: 1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; 2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; 3) height of the antenna above ground level and whether the antenna was properly oriented; and 4) weather conditions and time of day when tests were done.

18. In our review, we note that on the two occasions that Time Warner conducted tests of WOCD's signal (April 20, 1993 and May 11, 1993), it did only one reading instead of the required four readings over a two-hour period. In addition, it failed to provide the specifics of its tests as set forth above. It should also be pointed out that the 25 foot measurement height used by Time Warner is apparently considerably less than that called for by the local terrain. Not only is the treeline said to be at 65 feet, but WOCD states in its complaint that no UHF television broadcast reception equipment is located on Time Warner's approximately 120 foot tower below the 70 foot level. When measured against our criteria, therefore, we conclude that the determination reached by Time Warner is insufficient to demonstrate that WOCD's signal is not of "good quality" at its system headend.

ORDER

19. In view of the foregoing, we find that grant of Time Warner's ADI petition (CSR-4115-A) is not in the public interest. Further, we find that grant of WOCD's must carry complaint (CSR-4149-M) is in the public interest.

20. Accordingly, IT IS ORDERED, pursuant to §614(C) of the Communications Act of 1934, as amended (47 U.S.C. 534) and §76.59 of the Commission's Rules (47 CFR §76.59), That the captioned petition for special relief, filed October 5, 1993, on behalf of Time Warner Cable, IS DENIED. In addition, pursuant to §615(J)(3) (47 U.S.C. 535), the petition filed November 3, 1993, on behalf of Cornerstone Television, Inc., IS GRANTED and Time Warner Cable IS ORDERED to commence carriage of Station WOCD forty-five days from the release date of this Order unless Time Warner submits within fifteen days the engineering data required herein to support its assertion of poor signal quality from WOCD at Time Warner's prinicpal headend.

21. These actions are taken pursuant to authority delegated under §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of

Lawton Chiles, Bob Martinez,
Bill Nelson and Jim Smith

Against Station WCPX-TV
Orlando, Florida

ORDER

Adopted: January 17, 1995; Released: January 25, 1995

By the Chief, Mass Media Bureau:

1. The Mass Media Bureau has before it a complaint filed December 8, 1992, on behalf of Lawton Chiles, Bob Martinez, and Bill Nelson (hereinafter, collectively, "Complainants").[1] Complainants allege that Station WCPX-TV, Orlando, Florida, overcharged them during the September 4, 1990, primary and the November 6, 1990, general elections in violation of the lowest unit charge requirements of Section 315(b) of the Communications Act of 1934, as amended.[2] Chiles and Martinez were legally qualified candidates for nomination and election for Governor of the State of Florida in the 1990 primary and general elections; and Nelson was a legally qualified candidate for nomination for Governor of the State of Florida in the 1990 primary election. The Mass Media Bureau also has before it an Opposition to the complaint filed on February 16, 1993, by First Media Corporation, the licensee of Station WCPX-TV (hereinafter, "Station WCPX-TV").

2. In addition, the Mass Media Bureau has under consideration Complainants' Request for Leave to Supplement, dated March 24, 1994, and Station WCPX-TV's May 4, 1994, Opposition thereto. Complainants assert that their 1994 supplement addresses recent requirements complainants must meet regarding specificity of information and supporting documentation for use of generally-available average rates, citing *Dianne Feinstein, John Seymour, Thomas Hayes, et al. (KABC-TV)*, 9 FCC Rcd 1586 (MMB 1994) (*"KABC-TV"*); *McConnell Senate Committee (WCPO-TV)*, 9 FCC Rcd 1602 (MMB 1994) (*"WCPO-TV"*); *Mitch McConnell (WLEX-TV)*, 9 FCC Rcd 1598 (MMB 1994); and *Lawton Chiles, Bob Martinez, Bill Nelson, and Jim Smith (WTVT(TV))*, 7 FCC Rcd 6661 (MMB 1992), *modified*, 7 FCC Rcd 7199 (MMB 1992), *review granted in part and denied in part*, 8 FCC Rcd 131 (1992) (*"WTVT(TV)"*).

3. The Bureau has acknowledged that *WTVT(TV)* imposed a new standard of specificity, requiring complainants to provide more precise information regarding the manner in which generally-available average rates are utilized. 7 FCC Rcd at 6662, n.8. However, the Station WCPX-TV Complaint was filed on December 8, 1992, *after* the release of the Bureau's October 1992 *WTVT(TV)* decision, and the supplement was not filed until March 1994, over a year after release of *WTVT(TV)*. Moreover, the Complainants do not indicate how, in their view, the cases following *WTVT(TV)* have changed the "requirements" in any way relevant to their instant complaint, and it is far from apparent to us.

4. Finally, the Bureau specifically stated in *WTVT(TV)* that:

> pleadings other than the complaint and the answer tothe complaint will not be accepted unless the party filing the additional pleading has demonstrated that the information presented is new and vital to the resolution of the complaint, and could not have been included in the original complaint because the facts were previously unknown or unavailable to the complainant, and could not have been discovered through reasonable efforts.

7 FCC Rcd at 6661. Complainants have not satisfied this criteria and their request to supplement their complaint will be denied.

5. Applying the guidelines set forth in *Lowest Unit Charge Requirements*, 6 FCC Rcd 7511 (1991), *recon. denied*, 7 FCC Rcd 4123 (1992) (*"Declaratory Ruling"*), to the information presented, we find that Complainants have failed to established a *prima facie* case of a lowest unit charge ("LUC") violation. To establish a *prima facie* case, a complainant must, at a minimum, submit a "short plain statement of the claim sufficient to show that the complainant is entitled to the relief requested." *Declaratory Ruling*, 6 FCC Rcd at 7513. Complainants have failed to meet this burden and, accordingly, their claims against Station WCPX-TV are hereby dismissed. Following is a discussion of the Bureau's findings with respect to the specific issues raised by Complainants.

I. ALLEGATIONS CONCERNING MISLEADING RATE CARDS

6. Complainants allege that the political rate cards distributed by Station WCPX-TV during the 1990 elections were misleading and that the station intentionally steered

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[1] Jim Smith was originally a party to this proceeding, but has withdrawn as a complainant. *See* Request for Leave to Supplement, dated March 24, 1994, n.3. Accordingly, allegations concerning Smith are not considered.

[2] Section 315(b) provides as follows:

> (b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed -
>
> (1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period and;
>
> (2) at any other time, the charges made for comparable use of such station by other users thereof.

47 U.S.C. Section 315(b).

candidates toward the purchase of higher priced spots. In support of its allegations, Complainants submitted copies of the political rate cards Station WCPX-TV utilized during the 1990 primary period. The rate cards specified fixed and suggested rates, with a notation that lowest unit rates were available upon request. Complainants assert that it was reasonable to conclude that the suggested rate was not a fixed rate, but a mid-level rate with a lower degree of preemptibility than the lowest unit rate for preemptible time. To bolster their interpretation, the Complainants provide an affidavit from Leslie J. Edelstein, an "expert" in the area of political rates. Edelstein states that, after reading the Station WCPX-TV rate card, she would "conclude that the suggested rate is not a fixed rate, but is a preemptible rate."

7. Station WCPX-TV asserts, however, that the suggested rate was a fixed *candidate* rate as compared with the standard commercial fixed rate also listed on the rate card. The station claims that both rates were given to show candidates that they were, in fact, being offered fixed rates at substantially lower costs than those paid by commercial advertisers. Complainants argue that the rate card was confusing and that because it was reasonable for candidates to assume that the suggested rate was a preemptible rate, the Complainants are now entitled to rebates back to the lowest preemptible rates.

8. In response, Station WCPX-TV contends that its rate card was clear, and that its rates were fully explained to all candidates or their representatives.[3] In addition, Station WCPX-TV argues that the Complainants have provided no evidence that either they or their representatives were actually confused or misled. In fact, Station WCPX-TV points out, and the evidence supplied by the Complainants verifies, that the Complainants purchased both fixed and preemptible time from the station. Finally, Station WCPX-TV argues that the affidavit of Edelstein should be discredited because Edelstein does not state that she actually purchased time for the Complainants or from the station.

9. We find that Complainants have not made a *prima facie* case that Station WCPX-TV misled or attempted to "steer" them toward the purchase of higher-priced, non-preemptible spots. No evidence was provided that either the Complainants or their representatives were actually confused by the station's rate card. Rather, the record indicates that all Complainants purchased both suggested (fixed) spots and preemptible spots. *See Lawton Chiles, Bob Martinez, Bill Nelson, and Jim Smith (WCIX-TV)*, 8 FCC Rcd 4019 (MMB 1993). Finally, there is no evidence that a candidate or his representative was denied information explaining the station's rate card or the type of spots available.

II. OVERCHARGE ALLEGATIONS

A. Comparison With Charges for Florida Lottery Spots

10. Complainants claim that one advertiser, the Florida Lottery ("Lottery"), paid less than candidates for spots aired during the lowest unit charge period. In support thereof, Complainants compare the amounts they paid for spots between August and October 1990, with the amounts paid by the Lottery during the same time period. The only documentation provided are copies of invoices for the Lottery spots, an invoice of spots purchased by Martinez in September 1990, and evidence of rebates by the station to the Complainants. The rebate information is the only documentation provided which identifies any classes of time purchased by Complainants, and those documents identify only the classes of time for rebated spots. There is no evidence or assertion as to the classes of time purchased by the Lottery during the same time period. In these circumstances, we lack sufficient information to determine whether the Complainants have shown, *prima facie*, that they were overcharged for the "same class and amount of time for the same time period" as required by Section 315 of the Act.

11. Complainants further contend that because of confusion concerning the station's rate card, they should be rebated to the lowest preemptible cost of every comparable spot. However, as discussed above, we have declined to accept such a position. Finally, at least with respect to the analyses contained in the text of the complaint, the station explains that the price differentials occurred because the Complainants purchased fixed time and the Lottery purchased preemptible time.[4]

12. Complainants have provided us with insufficient information to compare the spots purchased by them with the spots purchased by the Lottery. Accordingly, absent evidence that the Complainants and the Lottery purchased the same class of time, we must dismiss Complainants' allegations. *See KABC-TV*, 9 FCC Rcd at 1587; *citing WTVT(TV)*, 7 FCC Rcd at 6662-63.

B. Comparison With Generally-Available Statistical Data

13. The Complainants also rely on generally-available statistical data to show that they were overcharged by Station WCPX-TV. Specifically, the complaint provides a comparison of time purchased by Martinez with SCOOP (Spot Cost Outlook and Projections) data.[5] Other than Martinez, the complaint does not specifically indicate which candidates were overcharged for which spots and no candidate invoices are provided for any other candidate. Finally, as Station WCPX-TV points out, the complaint does not iden-

[3] Station WCPX-TV claims that the so-called rate cards submitted by the Complainants were actually planning guides. However, as they were apparently distributed to the candidates or their representatives, the title of such documentation is irrelevant for our purposes. Station WCPX-TV also asserts that prior to and during the election window a statement explaining the station's various classes of time was distributed to candidates and their buyers. Since neither the station nor the Complainants produced a copy of this statement, this too is irrelevant to our disposition of this complaint.

[4] Complainants contend that because the political and candidate invoices they submit do not identify the class of time sold, class cannot be used to explain the cost differentials. However, as Station WCPX-TV asserts, this argument is illogical. The fact that the invoices Complainants submit are silent as to classes of time purchased does not mean that the station did not sell different classes of time. In fact, Complainants themselves purchased both fixed and preemptible classes of time from Station WCPX-TV. Complainants also argue that class distinctions should be disregarded because none of the Lottery spots they identify in the text of the complaint were preempted. The station, however, has indicated in response that some of the Lottery spots have, in fact, been preempted. Accordingly, class of time remains a valid distinguishing factor in this proceeding.

[5] Station WCPX-TV objects to the use of generally-available statistical data. However, the Commission has specifically endorsed the use of such data to make a *prima facie* case of an LUC violation. *Declaratory Ruling*, 7 FCC Rcd at 7521, n.47.

tify the ratings used in its analyses or the source of its rating data. Accordingly, even as to Martinez, the Commission cannot assess the accuracy of Complainants' claims.[6] When a complainant is relying on generally-available statistical data, it must provide the Commission with the data it used to form the basis of its allegations. *WTVT(TV)*, 7 FCC Rcd at 6662-63, 8 FCC Rcd at 132.

C. Rebate Allegations

14. Complainants contend both that the issuance of rebates by Station WCPX-TV is grounds for finding a violation and that the rebates made by the station were untimely. Station WCPX-TV states that upon inquiry from the candidates or their representatives, over a year before the filing of the complaint, it conducted a complete audit of the sale of political time to all candidates during the 1990 LUC period. The station contends that it has made every effort to make rebates as soon as possible, but that it was necessarily a time consuming process. Further, it asserts that in order to give candidates the "benefit of the doubt," in some cases rebates were issued where the station did not necessarily need to do so, but where some possible question existed.

15. Broadcasters have long been required to make rebates to political candidates who paid more for an advertising spot than a commercial advertiser for the same class and length of spot during the same time period.[7] However, it was not until the codification of the Commission's political programming policies in 1991, that the Commission specifically stated that all rebates had to be made in a timely fashion. *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678, 694 (1991), *recon. denied*, 7 FCC Rcd 4611 (1992) ("We . . . will henceforth require that stations review their program logs periodically during the election period to determine whether rebates are required, and issue any such rebates or credits promptly"). This complaint concerns the 1990 LUC period, and we did not specify the necessity of making timely rebates until 1991. We cannot find the station culpable for violation of a rule which did not exist.

16. Further, while we agree with the Complainants that the issuance of rebates does not excuse a violation of our Rules, evidence of rebates is not in and of itself sufficient to make a *prima facie* case of an LUC violation.[8] Were we to find that rebates alone establish a *prima facie* case of rule violation, we would, in direct opposition to our Rules, be discouraging the issuance of rebates absent the filing of a complaint and a Commission ruling on the merits of each case.[9]

III. CONCLUSION

17. ACCORDINGLY, we find that Complainants have failed to make a *prima facie* case of violation of any obligation arising under Section 315(b). Therefore, the complaint against Station WCPX-TV is hereby DISMISSED, and the relief requested is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[6] It is important for the Commission to be able to verify that the same category of statistical and rating data is utilized. Failure to utilize the same category for each type of data in an LUC analysis will result in incorrect findings. For example, in an affidavit submitted by Edelstein in the *KABC-TV* case, Edelstein recognizes that the calculations using statistical data for an Adult 25+ demographic group and an Arbitron rating for household demographics would result in an erroneous conclusion. Thus, in that case, Edelstein withdrew her calculations which were based on such a mis-matched analysis. *See* Request for Leave to Supplement Complaint, dated March 4, 1993, filed on behalf of Dianne Feinstein, John Seymour, Thomas Hayes, et al., against Station KABC-TV.

[7] *See Public Notice, Licensees and Cable Operators Reminded of Lowest Unit Charge Obligations*, 4 FCC Rcd 3823, 3824 (1988).

[8] The Commission has found that, as is true in this case, where rebates were issued outside of efforts to settle an LUC proceeding, evidence of such rebates must be provided during document production. *WTVT(TV)*, 8 FCC Rcd at 135. This is not inconsistent with our ruling here as, once a *prima facie* case has been established, rebate information would be essential to a final determination of any LUC violations.

[9] See FED. R. EVID. 410 (evidence of subsequent remedial measures is not admissible).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T CORP.,
Complainant,

v.

MCI TELECOMMUNICATIONS CORPORATION,
Defendant. File No. E-95-2

ORDER

Adopted: January 13, 1995; Released: January 25, 1995

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On December 29, 1994, AT&T Corp. ("AT&T") and MCI Telecommunications Corporation (MCI") (together "the parties") filed a stipulation and joint motion to dismiss the above-captioned complaint proceeding. Under the principal terms of their stipulation:

> MCI shall, on or before January 7, 1995, modify its "1-800-CALL-INFO" service to allow billing only by means of calling card or credit card information provided by the calling customer, or in accordance with a valid, written agreement authorizing such billing. In particular, MCI shall not bill calls to "1-800-CALL-INFO" placed after January 8, 1995 solely on the basis of Automatic Number Identification ("ANI") information.
>
> * * * *
>
> In any event, MCI shall not act or seek to resume or initiate the billing of calls to "1-800-CALL-INFO" except as [stipulated above], unless MCI shall first have provided at least 45 days written notice to the Commission's Common Carrier Bureau and Enforcement Division, such notice to include, at a minimum, a concise description of the billing change MCI seeks to effect.

Stipulation and Joint Motion to Dismiss Complaint at 1-2.

2. AT&T and MCI move jointly for dismissal of the complaint on the basis of their stipulation. The parties represent that such dismissal shall be with prejudice as to any acts, omissions or causes of action arising or alleged to have arisen before the date of the stipulation, but without prejudice as to any acts, omissions or causes of action (including an action to enforce the terms of the stipulation) arising or alleged to have arisen on or after the date of the stipulation.[1] The parties state further that "the conservation of Commission resources accruing from such dismissal -- together with the conditions established in the parties' stipulation -- would be in the public interest."[2]

3. We are satisfied that an order entering the stipulation and dismissing the complaint in the manner requested by the parties will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources by the parties and by the Commission.

4. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' request for an order entering their stipulation and dismissing the complaint as described in their joint motion IS GRANTED.

5. IT IS FURTHER ORDERED that the "Motion of the Telecommunications Subcommittee of the Consumer Protection Committee, National Association of Attorneys General, For Leave to Submit an *Amicus* Brief," filed November 15, 1994, IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

[1] Stipulation and Joint Motion to Dismiss Complaint at 2-3.
[2] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of KX Acquisition, L.P. against KBL Cablesystems of Minneapolis L.P. and KBL Cablesystems of Southwest, Inc. both d/b/a Paragon Cable	CSR-4165-M
Minneapolis	MN0180
Eden Prairie	MN0196
Edina	MN0917
Hopkins	MN0198
Richfield	MN0199
Minnetonka	MN0200

Request for Channel Positioning

MEMORANDUM OPINION AND ORDER

Adopted: January 18, 1995; Released: January 25, 1995

By the Cable Services Bureau:

SUMMARY OF PLEADINGS

1. On December 7, 1993, KX Acquisition L.P., licensee of KXLI-TV, Channel 41, St. Cloud, Minnesota ("KXLI"), filed the present complaint asking the Commission to require KBL Cablesystems of Minneapolis L.P. and KBL Cablesystems of Southwest, Inc. both d/b/a Paragon Cable ("Paragon") to reposition the KXLI's signal from channel 41 to channel 13 on the operator's systems serving Minneapolis, Eden Prairie, Edina, Hopkins, Richfield, and Minnetonka, Minnesota. Two parties filed oppositions to KXLI's channel positioning complaint: Paragon, the cable operator, opposed the complaint on January 6, 1994, and Twin Cities Public Television, Inc., licensee of noncommercial television station, KTCI-TV, Channel 17, St. Paul, Minnesota, ("TCPT" or "KTCI") filed an opposition on January 11, 1994.[1] KXLI filed a consolidated reply on January 21, 1994 countering the arguments raised by both Paragon and KTCI in their oppositions.[2] On February 7, 1994, KTCI filed a motion for leave to file a response to KXLI's reply, in addition to its response. On February 23, 1994, KXLI filed an opposition to KTCI's motion for leave to file a response, in addition to its motion to strike KTCI's response.

2. In its complaint, KLXI states it is a local commercial television station affiliated with the Home Shopping Network and that it is entitled to carriage on cable systems within the Minneapolis-St. Paul (St. Cloud), Minnesota ADI. According to KXLI, Paragon's cable systems are also located within the same ADI. KXLI argues that while it is now carried on channel 41, its over-the-air channel assignment, it has elected and is entitled to carriage on channel 13 on Paragon's cable systems because it occupied that channel assignment on July 19, 1985. KXLI asserts that the 1992 Cable Act and the Commission's rules give home shopping stations the right to select the channel position they occupied on that date, among other options. It contends that the Cable Act and our rules give it a clear legal priority to channel 13 over KTCI, the noncommercial television station which currently occupies that channel position through a mutual agreement with Paragon. Lastly, KXLI claims that "Paragon has offered no 'technical' reason why KXLI's election of channel position thirteen (13) cannot be accommodated."

3. KXLI details the following events in its complaint and related attachments. On May 12, 1993, KXLI sent Paragon its request for carriage, asking for channel 13 since that was the position it held on July 19, 1985. KXLI noted that while it was a "Home Shopping" station and was not then entitled to carriage, it considered changing its programming format by October 1, 1993 so that it could qualify as a must carry signal. On June 2, 1993, Paragon notified area broadcasters of their channel positions on its cable systems; this letter indicated that KXLI was not being carried.[3] On June 16, 1993, KXLI responded to this notice with another request for carriage on channel 13, again noting its home shopping affiliation and reiterating its proposed format change.

4. On August 11, 1993, KXLI renewed its request for carriage and channel positioning on channel 13, this time as a "Home Shopping Network" affiliate following the Commission's new signal carriage ruling concerning home shopping stations. On September 7, 1993, without a response from the cable operator, and learning from newspaper articles and other sources that its signal was being carried on channel 41, KXLI notified Paragon of its failure

[1] TCPT notes that public notice of the KXLI's complaint was given on December 17, 1993 but that the notice was amended on December 22, 1993. TCPT argues that its pleading is timely filed because the amended public notice did not indicate that its effective date was retroactive to the December 17th public notice. TCPT alternatively requests a waiver of Section 76.7 so that its views on the matter can be fully considered. In its consolidated reply, KXLI argues that the amended public notice clearly applied to matters unrelated to this proceeding and since KTCI's opposition was not filed within 20 days of the original public notice, its opposition should be dismissed as untimely. The Commission amended its December 17, 1993 public notice on December 22, 1993 because we found a mistake in the numbering of CSRs. We believe that since the error was on our part, and we do not want to prejudice any party because of it, the effective public notice date is December 22, 1993. Therefore, we do not consider KTCI's pleading to be late-filed because December 22, 1993 was the public notice date which triggered the twenty day period for oppositions to be filed. *See* 47 C.F.R. §76.7(d) ("Interested persons may submit comments or oppositions to a petition for special relief or a must carry complaint within twenty (20) days after the date of public notice of the filing of such petition or complaint.").

[2] KXLI filed a supplement to its reply on January 24, 1994. This pleading's sole purpose was to update the record with an originally executed declaration of Ronald O. Eikens, General Manager of KXLI-TV.

[3] *See* KXLI complaint at attachment D. KTCI was said to be positioned on channel 17. Paragon now asserts that its June 2, 1993, letter notifying stations of their channel positions contained a clerical error that listed KTCI on channel 17 rather than on channel 13 as had been agreed to.

to meet its channel positioning obligations.[4] On October 25, 1993, Paragon responded to that notice and formally rejected the request for carriage on channel 13.[5] KXLI then filed its complaint with the Commission after negotiations failed to resolve the dispute.

5. In its opposition, Paragon states that KXLI's complaint should be rejected because it conflicts with the channel positioning rights of KTCI. Paragon explains that in February 1991, it secured channels 15 to 22 on its cable systems with a mid-band trap to allow subscribers to choose among multiple levels of cable service without the need for converters. As a result of the trapping, Paragon repositioned KTCI from its over-the-air location on channel 17 to channel 13 so that the station could be available to all subscribers on the basic tier.[6] KTCI guaranteed its channel positioning right to channel 13 through a mutual agreement with Paragon in April, 1993. Paragon asserts that forcing KTCI to be carried on channel 17 would require the removal of traps and undermine Paragon's ability to offer multiple levels of service. Paragon also notes that it did not "bump" KXLI when it relocated KTCI to channel 13 in 1991 because lost this cable channel slot when it went off-the-air in 1988. Finally, Paragon argues that, as a home shopping station, KXLI did not have signal carriage rights when it first elected channel 13 in June, 1993 and that when it could validly assert its rights after the Commission's home shopping station decision was released, it was too late because KTCI's request was first in time. Paragon urges the Commission to reject the complaint and maintain the status quo because this approach would be the least disruptive, especially for subscribers.

6. In its opposition, TCPT also asks the Commission to reject KXLI's channel positioning complaint. TCPT asserts that repositioning KXLI to channel 13 "will cause substantial disruption" to the audiences which watch KTCI and will impair the station's ability to serve minority and other special audiences residing in the Minneapolis, MN ADI with its "unique and distinctive" programming. TCPT explains that KTCI has occupied channel 13 for nearly three years and has developed a following among the operator's 116,000 cable subscribers over that time. TCPT then states that it reached a mutual agreement with Paragon regarding carriage of KTCI on channel 13 and that it would be "manifestly unfair" to allow KXLI to disrupt this channel positioning agreement at such a late date. TCPT also adds that Congress could not have intended, when it adopted Section 614(b)(6) of the Cable Act, "to require cable operators to displace a local television station in order to allow a television station to reclaim a channel position it lost because it went off-the-air." TCPT urges the Commission to treat KXLI as a new station and assign it to channel 41, its over-the-air channel position.

7. In its consolidated reply, KXLI asserts that it has the sole legal right to cable channel 13 because it was carried on that channel on July 19, 1985 and that KTCI does not have any statutory claim to channel 13 because the Commission's rules allow it to select only its over-the-air channel (channel 17) or the channel on which it was carried on July 19, 1985 (channel 3).[7] It adds that nothing in the Commission's rules or the 1992 Cable Act suggests or permits a channel positioning agreement between a station and a cable operator to preclude the channel positioning rights of another must carry signal. KXLI also asserts that Paragon was on notice that it would assert its right to cable channel 13 because of the notifications it sent on May 12 and June 16, 1993 and that any agreements made between Paragon and TCPT for that channel directly contradict KXLI's rights. It also notes that, contrary to Paragon's characterization, KXLI's requests to work with the operator to resolve the situation amicably have met with nothing but resistance.

8. KXLI then claims that the arguments made by Paragon and TCPT in their oppositions are irrelevant or exaggerated. As an example, KXLI points out that while TCPT asserts the grant of KXLI's complaint will cause it hardship, it notes that the station earlier expressed no specific preference for channel 13. KXLI also attacks the amount and kind of programming KTCI broadcasts and then claims that the nature of KTCI's programming bears no relationship to the statutory scheme adopted by Congress for channel positioning rights. As for Paragon, KXLI argues that the cable operator has not presented any evidence to suggest that it cannot technically comply with its channel positioning obligations. Finally, KXLI argues that Paragon and KTCI are in effect asking the Commission to waive KXLI's statutory right to choose the cable channel on which its station was carried on July 19, 1985. It adds that the Commission has no power or authority to waive section 614(b)(6) of the 1992 Cable Act as it applies to KXLI.

9. In its motion for leave and response, TCPT attempts to correct KXLI's characterization of its legal arguments and KXLI's description of the programming service offered by KTCI. TCPT argues that, contrary to KXLI's stance, the 1992 Cable Act gives noncommercial stations the right to negotiate a channel position with the cable operator and that such an agreement has the same statutory weight as KXLI's claim based on its carriage in July 1985. TCPT adds that since the Paragon-TCPT agreement implements the Commission's recommendation that broadcasters and oper-

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[4] On September 3, 1993, KXLI General Manager Ronald Eikens called Paragon's General Manager Wayne Knighton about the channel positioning issue. Mr. Knighton, it is said, explained that KTCI exercised its rights first, and that Paragon believed that since KTCI had been carried on channel 13 more recently than KXLI, KTCI had a greater right to be placed on that channel. In addition, KXLI asserts that Paragon was unwilling to negotiate another channel position. *See* KXLI complaint at attachment A.

[5] KXLI adds that Paragon's response to its letter was untimely because it was not submitted within 30 days of receipt under section 76.61(a)(2) of the Commission's rules. *See* 47 U.S.C. §76.61(a)(2)("The cable operator shall, within 30 days receipt of such written notification, respond in writing to such notification and either commence to carry the signal of such station in accordance with the terms requested or state its reasons for believing that it is not obligated to carry such signal or is in compliance with the channel positioning and repositioning and other requirements of the must-carry rules.") That, however, does not affect the ultimate merits of the dispute over the statutory channel positioning rights of the stations in question.

[6] KTCI once shared channel 13 with Univision, a spanish language cable programmer. *See* KXLI complaint at attachment G. According to KXLI, Univision is now located on channel 17.

[7] KXLI suggests that Paragon could easily resolve the channel positioning conundrum by placing KXLI on 13, KTCI on channel 17, its over-the-air channel, and Univision on channel 41.

ators should continue carrying stations in their current cable channels, the Commission cannot give KXLI a higher priority than KTCI. KTCI then asserts that KXLI's arguments about its programming should be ignored because the services the station provides serves the unique needs of minority residents in Minneapolis and surrounding communities. To support its position, KTCI recites several programming examples.

10. In its opposition to motion for leave and motion to strike, KXLI advances procedural and substantive arguments against KTCI. First, it asserts that KTCI's motion for leave should be denied because it is an unjustified attempt to argue new matters after the official pleading cycle has ended. KXLI claims that KTCI's unofficial pleading does not correct mischaracterizations but only advances a position it neglected to address in its opposition, namely, that mutual channel positioning agreements between operators and noncommercial stations are valid under Section 615(g)(5) of the 1992 Cable Act. KXLI then argues that KTCI's description of its programming has no relevance to this proceeding since they are not related to the issue of whether Paragon violated Section 76.57(a) of the Commission's rules. In addition, KXLI claims that KTCI's assertion that its programming serves the communities in its area is irrelevant because no connection is shown between the programming and the need to be placed on channel 13. For these reasons, KXLI requests that KTCI's response should be stricken and disregarded in this proceeding.[8]

DISCUSSION

11. On October 5, 1992, the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act" or "Cable Act") became law.[9] On March 11, 1993, the Commission adopted a *Report and Order* to implement the mandatory broadcast signal carriage ("must-carry") provisions of the Cable Act.[10] Pursuant to the rules adopted in the *Report and Order*, cable systems were required to commence carriage of local broadcast stations entitled to must-carry status beginning June 2, 1993.[11] By June 17, 1993 local broadcast stations were required to make their initial election of either must-carry or retransmission consent status and notify cable systems of their election.[12] Those broadcast stations which elected must-carry status were required to notify the cable system of their preferred channel position at that time.[13] Cable systems were required to commence carriage of noncommercial stations on December 4, 1992, the effective date of the 1992 Cable Act. Unlike their commercial counterparts, noncommercial stations are required to affirmatively demand carriage.

12. The 1992 Cable Act, however, did not immediately grant signal carriage rights to commercial television stations "predominantly utilized for the transmission of sales presentations or program length commercials" ("home shopping stations").[14] Rather, Congress instructed the Commission to commence a rulemaking to determine if the mandatory carriage of home shopping station signals served the public interest, convenience, and necessity.[15] On July 2, 1993, the Commission adopted the *Home Shopping Station Report and Order* holding that home shopping stations are operating in the public interest and are qualified as local commercial television stations for the purposes of cable carriage.[16] This order required affected television stations to assert their must carry rights within 30 days after publication of the rules in the Federal Register, which occurred on July 22, 1993.

13. The Cable Act and our rules offer three channel options available to a commercial broadcast station electing must-carry: 1) a station may elect to be carried on its over-the-air channel; or 2) on the channel on which it was carried on July 19, 1985; or 3) on the channel on which it was carried on January 1, 1992.[17] For a noncommercial broadcast station, the Cable Act and our rules offer two channel options: 1) its over-the-air channel or 2) the channel on which it was carried on July 19, 1985.[18] The statute and our rules also provide that a broadcast station may be carried "on such other channel as is mutually agreed upon by the station and the cable operator."[19]

14. While we read the 1992 Cable Act and the Commission's Rules to unambiguously state that there are two options--not three--available to a noncommercial broadcasters, the language of the statute also specifically allows cable operators and noncommercial broadcasters to mutually agree upon a different channel. This mechanism allows the two to negotiate a channel positioning option outside of the two proposed by the 1992 Cable Act's provisions.[20] It is simply a way of saying that the parties have the flexibility to reach a result different from the two statutory options.[21]

15. We therefore agree with Paragon and TCPT that the channel positioning agreement reached between the parties is valid and enforceable. We believe that mutual agreements between cable operators and commercial or

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[8] While we are inclined to grant KXLI's motion to strike because KTCI's response touches upon matters that it neglected to address in its opposition, we believe such an action would be moot since we are denying KXLI's channel positioning request. *See below.*

[9] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[10] *Report and Order* in MM Docket 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd 2965 (1993). *See also, Memorandum Report and Order* in MM Docket No. 92-259, (Broadcast Signal Carriage Issues), FCC 94-251 (released November 4, 1994).

[11] 47 C.F.R. § 76.56(a),(b).

[12] 47 C.F.R. § 76.64(f)(1).

[13] 47 C.F.R. § 76.57(d).

[14] *See* 47 U.S.C. §534(g).

[15] *See* 47 U.S.C. §534(g)(2).

[16] *See Home Shopping Station Issues*, 8 FCC Rcd 5321 (1993), *reconsideration pending.*

[17] 47 U.S.C. § 534(b)(6); 47 C.F.R. § 76.57(a).

[18] 47 U.S.C. § 535(g)(5); 47 C.F.R. § 76.57(b).

[19] 47 U.S.C. §§ 534(b)(6) and 535(g)(5); 47 C.F.R. § 76.57(c).

[20] *See Report and Order*, 8 FCC Rcd. at 2986 ("The election of which of these three alternatives is left up to the station involved.") We also note that the 1992 Cable Act provides three channel positioning options for each commercial station and two for each NCE station, and also provides an opportunity for parties to develop their own solutions to conflicting claims. *Id.* at 2988.

[21] It does not, however, mean that in the event the two options are not available the parties *must* agree on the ultimate placement of the channel. To read this flexibility as a mandatory third option would totally obviate the prior two options as broadcasters would clash with other broadcasters in seeking what they viewed as a more favorable channel position, leaving the cable operator in the position of having to choose between competing broadcasters.

noncommercial television stations have as much weight as the other channel positioning options under the 1992 Cable Act and our rules. Once an agreement is consummated, the channel positioning rights vest in the broadcast station. In this case, once KTCI acceded to channel 13 as its channel position by mutual agreement between itself and Paragon, the station can claim it to the exclusion of others.

16. We also believe that a broadcast station which first asserts a valid claim to a channel position has a legal priority over all stations subsequently requesting that same channel position. While we declined to adopt a formal priority structure for resolving conflicting channel positioning claims in our *Report and Order,* we did discuss a comparable first-in-time rule in our July 15, 1993, *Clarification Order* with regard to "default" must carry stations (i.e. those stations which did not affirmatively elect must carry status).[22] In that *Order* we determined that, in the event of a conflict, stations making affirmative carriage elections have channel positioning priority over default stations because those making an election were first to take action to enforce their rights.[23]

17. Here, we extend the logic of the *Clarification Order* to encompass situations where a qualified television broadcast station affirmatively asserts its channel positioning rights prior to other non-qualified television broadcast stations. On April 20, 1993, KTCI elected carriage on Paragon's cable systems and agreed to be positioned on channel 13. Subsequently, on May 12 and June 13, 1993, KXLI "elected" carriage and also chose channel 13 as its preferred channel position. However, KXLI did not have any must carry or channel positioning rights prior to our adoption of the *Home Shopping Station Report and Order* in July, 1993. Thus, its request for channel 13 in its May and June correspondence to Paragon had no force or effect. While it is true that Paragon was put on notice of KXLI's intentions, this point is inconsequential since KTCI, a qualified noncommercial television station, had acted first to enforce its carriage and channel positioning rights.

18. Similarly, we believe that Paragon has met its channel positioning obligations by placing KXLI on that station's remaining statutory choice. It is important to point out that KXLI is now carried by Paragon on channel 41, its over-the-air channel assignment. This channel position is one of the three options provided to full power commercial television stations by the 1992 Cable Act and the Commission's rules. We note that this is not the kind of situation which Congress attempted to remedy through the grant of channel positioning rights.[24] That is, there is no evidence that Paragon has wielded its market power to the detriment of KXLI and unfairly reshuffled the station to several different channel positions on the cable system to serve its own needs. KXLI cannot claim it is disadvantaged by being placed on a cable channel it could have chosen under the law.

19. Finally, in our *Report and Order,* we recommended that cable operators and affected broadcast stations give serious consideration to the value of maintaining current channel positions.[25] We reasoned that maintaining the status quo would be the least disruptive approach, particularly for subscribers.[26] We believe that preserving the existing channel order on Paragon's several systems would be in the public interest because it reduces the possibility of any subscriber confusion.

20. In view of the above, the complaint filed KX Acquisition, L.P., licensee of KXLI-TV IS DENIED, in accordance with §614 of the Communications Act of 1934, as amended. *See* 47 U.S.C. §534. This action is taken pursuant to authority delegated by §0.321 of the Commission's rules, 47 C.F.R. §0.321.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

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[22] *See* 8 FCC Rcd 5083 (1993).

[23] *Id.* at 5084. *See also* 47 C.F.R. §§76.56(b)(7) and 76.57(e).

[24] Congress' bases for giving broadcasters channel positioning rights are discussed in the legislative history of the 1992 Cable Act. One reason given was to prevent channel positioning shifts "made solely to enhance the competitive position of the cable operator's programming or its advertising availabilities." *See* S. Rep. No. 102-92, 102d Cong., 1st Sess. at 44 (1991). Congress also codified channel positioning rights to prevent the economic failure of television stations, which in turn, would harm viewers. *See* H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 55 (1992)("Local stations moved to a high channel number, often a location unexpected by their usual audience, may lose viewers and suffer a diminution of their capability of rendering program services in the public interest, a development that will harm all viewers, whether or not they subscribe to cable."). These concerns are inapplicable in this case because Paragon positioned KXLI on cable channel 41, its over-the-air channel, a location expected by the station's audience.

[25] *See Report and Order,* 8 FCC Rcd. at 2988.

[26] *See id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Lightning Broadcasting Company against Triax Communications Corporation	CSR- 4265-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: January 17, 1995; Released: January 25, 1995

By Cable Services Bureau:

1. On June 6, 1994, Lightning Broadcasting Co. ("LBC"), licensee of low power television station W41BL (Channel 41), Effingham, Illinois, filed a complaint against Triax Communications Corp. ("Triax"), an operator of cable systems serving Bethany, Findlay, Herrick, Oconee, Sullivan, and Tower Hill, Illinois. LBC requests that the Commission require Triax to commence carriage of W41BL. An opposition to this complaint was filed on July 7, 1994, on behalf of Triax, to which LBC responded.

2. In support of its petition, LBC argues that W41BL is eligible for carriage because it meets all the necessary requirements under the 1992 Cable Act and our rules. Specifically LBC asserts that W41BL: 1) is a 24-hour per day low power television station broadcasting from a transmitter located at north latitude 39°16'19", west longitude 88°30'32"; 2) is located within 35 miles of the principal headends for the Bethany, Findlay, Herrick, Oconee, Sullivan and Tower Hill cable systems operated by Triax; 3) is in full compliance with Part 73 of the Commission's rules governing children's programming, political broadcasting and equal employment opportunity; 4) Effingham, its community of license, has a population of 11,851 and is not located within the 160 largest metropolitan statistical areas; 5) provides locally-originated programming;[1] and 6) there are no full power television stations licensed to the county or other political subdivision of the State served by the cable systems. LBC states that in a letter dated April 4, 1994, the station demonstrated that it met all of the necessary statutory requirements and requested carriage on Triax's cable systems serving the six referenced Illinois communities. To date, however, LBC maintains that the operator has not commenced carriage despite the fact that it has adequate channel capacity to carry the station on all six systems.[2]

3. In its opposition, Triax states that it is not required to carry W41BL because the station does not deliver a good quality signal to Triax's headend facilities in Bethany, Findlay, Herrick, Oconee, Sullivan, and Tower Hill, Illinois. Triax explains that it has performed several signal strength studies with one series of tests including four signal readings over a two hour period at each headend location. Triax's measurements show that W41BL's signal strength is below the -45 dBm signal strength requirement for low power UHF commercial television stations as set forth by the 1992 Cable Act and the Commission's rules.[3] Triax also argues that LBC did not submit sufficient evidence, either at the time of its must carry request or when it filed its complaint, to demonstrate compliance with the Commission's regulations, particularly with respect to broadcast programming issues. Lastly, Triax argues that even if the station could satisfy the Commission's standards, the LPTV provisions of the 1992 Cable Act and the Commission's rules should not be enforced here because they are constitutionally infirm.[4]

4. LBC emphasizes in its reply that it did not receive written notification of the signal tests performed by Triax and that it had no reason to believe that a prior phone conversation between the station and the operator comprised Triax's formal denial of its carriage request. LBC argues that public policy precludes Triax from raising the signal quality issue in the pleadings rather than in a carriage denial letter.[5] LBC then faults the signal tests performed by Triax because the operator does not demonstrate how the antennae were oriented during the signal strength measurements. LBC also notes that if properly performed tests indicate that the station's signal strength are indeed inadequate, it "would elect to provide the necessary equipment to boost the signal." As for Triax's argument that the station did not provide sufficient evidence to show that it is qualified, LBC counters that its letter to Triax demonstrated that it met every requirement for carriage and that the Commission found that an "almost identical showing" provided by LBC to another cable operator was ample evidence of compliance with Section 76.55(d)(2) of the Commission's rules. Lastly, LBC argues that Triax's con-

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[1] LBC includes a letter to Triax in its complaint which describes in greater detail the kind of local programming it broadcasts.

[2] LBC states that the *1993 Television and Cable Factbook* indicates that Triax has a channel capacity of 36 on its Bethany system (19 channels not in use); 36 on its Findlay system (15 channels not in use); at least 14 on its Herrick system (data on channels in use not given); 36 on its Oconee system (data on channels in use not given); 32 on its Sullivan system (data on channels in use not given); and 13 on its Tower Hill system (data on channels in use not given). LBC calculates that Triax is required to carry up to two qualified low power television stations on its systems in Bethany and Findlay, and at least one qualified low power television station on the four other systems.

[3] Triax maintains that it informed station personnel by telephone of W41BL's poor signal quality and that Triax was told that the reason for the poor signal was because the station was operating at substantially less than full power. Triax states that the station has not yet acted to improve the quality of its signal.

[4] Triax cites dicta in *Turner Broadcasting System, Inc. v. FCC*, No. 93-44, slip op. at 19 n.6 (U.S. Sup. Ct. June 27, 1994) where the Court stated that the LPTV provision of the broadcast signal carriage section of the 1992 Cable Act might be constitutionally suspect because it "appears to single out certain low-power broadcasters for special benefits on the basis of content."

[5] LBC states that if Triax had raised the signal quality issue before the complaint was filed, it would have told the operator that LBC's transmitter was struck by lightning, substantially reducing the station's power.

stitutional claim is without merit because neither the Supreme Court nor any inferior court has stayed the effectiveness of the Commission's must carry rules.

5. Section 614(a) of the Communications Act of 1934, as amended, requires the carriage of "qualified" low power (LPTV) stations in certain limited circumstances. *See* 47 U.S.C. §534(a). A LPTV station that conforms to the rules established for LPTV stations in Part 74 of the Commission's rules will be considered "qualified" only if: 1) it broadcasts for at least the minimum number of hours of operation required under 47 C.F.R. Part 73; 2) it adheres to Commission requirements regarding nonentertainment programming and employment practices;[6] 3) itcomplies with interference regulations consistent with its secondary status; 4) it is located no more than 35 miles from the cable system's headend; 5) the community of license of the station and the franchise area of the cable system are both located outside the largest 160 Metropolitan Statistical Areas (MSAs) on June 30, 1990, and the population of such community of license on that date did not exceed 35,000; and 6) there is no full power television broadcast station licensed to any community within the county or other political subdivision (of a State) served by the cable system. *See* 47 U.S.C. §534(h)(2); 47 C.F.R. §76.55(d). Furthermore, a low power television station must deliver an over-the-air signal of good quality to the cable operator's principal headend.[7]

6. We are not persuaded by the arguments raised by Triax regarding the inability of LBC to place a good quality signal over triax's several principal headends. With respect to the standard to be used to determine what constitutes a good quality signal, we note that the 1992 Cable Act did not set a specific standard for either VHF or UHF low power television stations. However, Congress did adopt a standard for determining the availability of VHF and UHF commercial stations at a cable system's headend: for VHF commercial television station signals, the standard is -49 dBm; for UHF commercial television station signals, the standard is -45 dBm. Consistent with Congress' guidance with respect to VHF and UHF commercial station availability, we believe it is reasonable to utilize the same standards as prima facie tests to initially determine, absent other evidence, whether VHF or UHF low-power television stations place adequate signal levels over a cable system's principal headend.

7. Because the cable operator is in the best position to know whether a given low power television station is providing a good quality signal to the system's principal headend, we believe that the initial burden of demonstrating the lack of a good quality signal appropriately falls on the cable operator. In meeting this burden, the cable operator must show that it used good engineering practices to measure the signal delivered to the headend. To measure a station's signal to see if it meets the Commission's requirements, a cable operator's signal strength surveys should, at a minimum, include the following: 1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; 2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; 3) height of the antenna above ground level and whether the antenna was properly oriented; and 4) weather conditions and time of day when tests were done.

8. In addition, our rules require that a cable operator must conduct multiple signal quality tests to ensure accurate results and, in turn, provide that testing information to the affected station when there is a dispute over signal level measurements. Generally, if the test results are less than -51 dBm for a UHF station, we have said that at least four readings must be taken over a two-hour period. Where the initial readings are between -51 dBm and -45 dBm, inclusive, we believe that the readings should be taken over a 24-hour period with measurements not more than four hours apart to establish reliable test results.

9. We are also not persuaded by Triax's argument regarding LBC's supposed failure to produce sufficient evidence that W41BL does not meet the afformentioned six criteria and thus is not entitled to mandatory carriage. Triax rejects the information provided by LBC in its April 4, 1994 carriage request letter as an incomplete description of W41BL's qualifications. However, we find that the programming information LBC provides in the letter along with objective criteria it includes in its complaint is sufficient to meet the requirements under §76.55(d)(2) of the rules. For example, in its April 4, 1994, correspondence to Triax, LBC lists such programming examples as "Heartland Happenings" and "Community Bulletin Board" to show that it airs locally originated programming. And in its complaint, LBC demonstrates that W41BL operates 24 hours a days and that the station is licensed to a community with a population, as of June 30, 1990, of less than 35,000. In fact, we held that LBC met its evidentiary burden to attain carriage in two other instances with information identical to the kind supplied here.[8]

10. We also find that Triax's constitutional argument is without merit. The constitutionality of the must carry provisions of the 1992 Cable Act were challenged before the Supreme Court. In *Turner Broadcasting Systems, Inc. v. FCC*, a special three-judge panel of the District Court for the District of Columbia found the must carry provisions constitutional. *See Turner Broadcasting Systems, Inc. v. FCC*, 819 F. Supp. 32 (D.D.C. 1993). On appeal, the Supreme Court vacated the decision and remanded the case back to the three judge panel for further proceedings. *See Turner Broadcasting Systems, Inc. v. FCC*, 114 S. Ct. 2445 (1994). However, the Court did not stay the statute's must carry provisions or our rules while the case is on remand. Thus, while the case is pending, the must-carry provisions

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[6] Section 614(h)(2)(B) provides that the LPTV station must meet "all obligations and requirements applicable to television broadcast stations under Part 73 of Title 47, Code of Federal Regulations, with respect to the broadcast of nonentertainment programming; programming and rates involving political candidates, election issues, controversial issues of public importance, editorials, and personal attacks; programming for children; and equal employment opportunity; and the Commission [must] determine that the provision of such programming by such station would address local news and informational needs which are not being adequately served by full power television broadcast stations because of geographic distance of such full power stations from the low power station's community of license." 47 U.S.C. §534(h)(2)(B); 47 C.F.R. §76.55(d).

[7] We note that the signal quality requirement is actually part of the fourth criterion and is not a separate seventh factor under the statute and our rules.

[8] *See Complaint of Lightning Broadcasting Company against Enstar Communications*, CSR-4056-M, at ¶ 4 (released April 28, 1994); *Complaint of Lightning Broadcast Company against Warner Cable of Altamont*, CSR-4062-M, at ¶ 8 (released May 20, 1994).

of the 1992 Cable Act remain in effect, as do the Commission's must-carry rules. *See Memorandum Report and Order* in MM Docket No. 92-259, (Broadcast Signal Carriage Issues), FCC 94-251 (released November 4, 1994) at ¶ 2.

11. As for the signal quality issue, we conclude that the technical determination reached by Triax is insufficient to demonstrate that W41BL's signal is not of "good quality." Specifically, we find that the cable operator did not provide evidence that it properly oriented the testing antennae when it conducted its several measurements. Moreover, Triax did not test the station's signal quality in a consistent manner *over* a two hour period at its Bethany, Herrick, Oconee, and Sullivan headends. Rather tests at these headends were conducted over a time period *less* than two hours.[9] However, while LBC appears willing to provide the necessary equipment to boost its signal to acceptable levels for carriage, its actions in this regard would not entitle it to demand carriage. Neither the 1992 Cable Act nor our rules allow a low power television station to cure a signal quality deficiency with additional equipment as full power television stations are allowed to do.[10] An LPTV station must meet each of the six qualifying criteria in the statute and our regulations; its failure to meet just one is fatal to its request for mandatory carriage.

12. We therefore find that Triax must carry the station at its six separate headends *only if* W41BL delivers an over-the-air signal of good quality. To reach a proper signal strength determination, we believe Triax must conduct additional signal quality tests at each of its six principal headends named in the complaint. Triax shall follow "good engineering practices" as defined by the Commission and properly orient its testing antennas in the direction of W41BL's transmitting tower.[11] In addition, each signal quality test must be performed *over* a two hour period. Triax shall notify LBC of the testing results by first class mail or similar means of communication. Triax will not be required to carry the station at any headend where signal quality is found to be poor.

13. In view of the above, the complaint filed on June 6, 1994, by Lightning Broadcasting Corporation, licensee of W41BL IS GRANTED, in accordance with §614(h)(2) of the Communications Act of 1934, as amended. *See* 47 U.S.C. §534(h)(2). Triax Communications Corporation IS ORDERED to commence carriage of W41BL forty-five (45) days from the release date of this Order unless Triax submits within fifteen (15) days the engineering data required herein to support its assertion of poor signal quality from W41BL at Triax's principal headends in Bethany, Findlay, Herrick, Oconee, Sullivan, and Tower Hill, Illinois. This action is taken by Cable Services Bureau, pursuant to authority delegated by §0.321 of the Commission's rules, 47 C.F.R. §0.321.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Service Bureau

[9] However, Triax appears to have followed good engineering practices and tested W41BL's signal *over* a two hour period at its Findlay and Tower Hill headends.

[10] In our *Must Carry Report and Order,* we specifically rejected a commenter's suggestion "to extend the provisions of Section 614(h)(B)(iii), which apply on their face to full power television stations, to LPTV stations." *See Broadcast Signal Carriage Issues,* 8 FCC Rcd. 2965, 2991. We noted that "such an interpretation is clearly not intended by Congress in the 1992 Cable Act." *See id.* Thus, only full power television stations, not low power television stations, are allowed to provide additional equipment to remedy an existing signal quality deficiency.

[11] We are assuming that LBC has completed the repair of its broadcast facilities after the lightning strike it spoke about in its reply.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 25, 1995

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON MCI'S APPLICATION FOR REVIEW OF THE 500 ACCESS WAIVER DECISION

On December 30, 1994, MCI Telecommunications Corporation (MCI) filed an application for review of the Commission's decision in the *500 Access Order*. (*See In the Matter of The Ameritech Operating Companies, et al, Petitions for Waiver of Sections 69.4(b) and 69.106 of Part 69 of the Commission's Rules*, DA 94-1350, released Nov. 30, 1994 (*500 Access Order*.) MCI requests that the Commission review its decision not to require uniform recurring rate elements for local exchange carriers (LECs) providing 500 access. MCI argues that the Commission's decision not to impose a uniform rate structure for 500 access places a burden on interexchange carriers and is contrary to the Commission's own stated support for implementing 500 number portability. MCI argues that different LEC rate structures places an administrative cost burden upon access users. MCI also argues that the decision works to the detriment of the development of the 500 service market. MCI requests that the Commission modify the *500 Access Order* to set a date certain for LEC implementation of a uniform rate structure, require that the uniform rate structure mirror the 800 database rate structure, and set a date certain for 500 rate portability.

Interested parties should file comments on the application by **February 21, 1995**, and reply comments by **March 8, 1995**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. Copies should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the Application can be obtained from ITS at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1579.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-13

In the Matter of

Amendment of Section 73.202(b), RM-8566
Table of Allotments,
FM Broadcast Stations.
(Tower Hill, Illinois)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 18, 1995; Released: January 26, 1995

By the Chief, Allocations Branch:

Comment Date: March 20, 1995
Reply Comment Date: April 4, 1995

1. The Commission has before it the petition for rule making filed by Randal J. Miller ("petitioner"), proposing the allotment of Channel 252A to Tower Hill, Illinois, as that community's first local transmission service. Petitioner states his intention to apply for the channel, if allotted.[1]

2. We believe the public interest would be served by proposing the allotment of Channel 252A to Tower Hill, Illinois, since it could provide the community with its first local transmission service. An engineering analysis has determined that Channel 252A can be allotted to Tower Hill in compliance with the Commission's minimum distance separation requirements with a site restriction of 9 kilometers (5.6 miles) south,[2] in order to avoid a short-spacing to the licensed sites of Station WZRO(FM), Channel 252A, Farmer City, Illinois and Station WACF(FM), Channel 253B, Paris, Illinois.

3. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Tower Hill, Illinois	--	252A

4. The Commission's authority to institute rule making proceedings,showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 20, 1995**, and reply comments on or before **April 4, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Randal J. Miller
111 West Main Cross
P.O. Box 169
Taylorville, Illinois 62568
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

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[1] Although the petitioners's request was signed, it failed to include an affidavit verifying that the statements contained in the petition were accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.401(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, 3919 n.41 (1990). The petitioner is requested to rectify this omission in its comments.

[2] The coordinates for Channel 252A at Tower Hill are North Latitude 39-18-27 and West Longitude 88-59-22.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments.
FM Broadcasting Stations
(Various Locations)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 18, 1995; Released: January 26, 1995

By the Chief, Allocations Branch:

1. This *Order* amends Section 73.202(b) of the Commission's Rules, the Table of FM Allotments, to specify the classes of channels allotted to various communities. These amendments are necessary to reflect changes that have been authorized in response to applications filed by licensees and permittees operating on these channels. This action is taken pursuant to *Revision of Section 73.3573(a)(1) of the Commission's Rules Concerning the Lower Classification of an FM Allotment*, 4 FCC Rcd 2413 (1989), and the *Amendment of the Commission's Rules to Permit FM Channel and Class Modifications [Upgrades] by Application*, 8 FCC Rcd 4735 (1993). The attached Appendix shows the Table, as amended for those communities.

2. This action constitutes an editorial change in the Table of FM Allotments. Therefore, a public notice and comment proceeding is unnecessary. *See 5 US.C. 553(b)(A) and (B).*

3. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

Community	Channel Deleted	Channel Added
Abbeville, Alabama	232A	232C3
Bay Minette, Alabama	293C3	293C2
College, Alaska	280C3	280A
Eagar, Arizona	223C2	23C1
Mount Shasta, California	300C1	300A
Kremmling, Colorado	292C2	292C3
Pensacola, Florida	268C1	268C
Plantation Key, Florida	276A	276C3
Douglas, Georgia	258C	258C1
Kokoma, Indiana	224A	223A
Hyden, Kentucky	250A	250C3
Owingsville, Kentucky	296A	299A
Bastrop, Louisiana	230C2	230C3
Sault Ste. Marie, Michigan	258C1	258C2
Clarksdale, Mississippi	243C	3243A
Clovis, New Mexico	268C	268C1
Warrensburg, New York	263A	262B1
Burgaw, North Carolina	260C	260C1
Elk City, Oklahoma	232A	232C3
Klamath Falls, Oregon	258C	258C1
Lowry, South Dakota	264C	264C1
Corpus Christi, Texas	234A	234C3
El Paso, Texas	234C1	234C
Point Comfort, Texas	231C	231C3
Ogden, Utah	238C	238C1
Iron River, Wisconsin	297C2	297C3
Rice Lake, Wisconsin	249C2	249C
Cheyenne, Wyoming	250C	250C1

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-12

In the Matter of

Amendment of Section 73.202(b), RM-8559
Table of Allotments,
FM Broadcast Stations.
(Hudson, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 18, 1995; Released: January 26, 1995

Comment Date: March 20, 1995
Reply Comment Date: April 4, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Phil Parr ("petitioner"), requesting the allotment of Channel 242A to Hudson, Texas, as the community's first local aural transmission service. Petitioner states he will apply for the channel, if allotted.[1]

2. In support of his proposal, petitioner states that Hudson has a city government comprised of an elected mayor and city council. In addition, petitioner notes that Hudson has a fire department, a public school system and numerous businesses.

3. We believe the public interest would be served by proposing the allotment of Channel 242A to Hudson[2] since it could provide the community with its first local FM service. Channel 242A can be allotted to Hudson in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction[3]

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Hudson, Texas	--	242A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **March 20, 1995**, and reply comments on or before **April 4, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Phil Parr
1604 Southwood
Lufkin, Texas 75904
(Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202)634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be

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[1] Although petitioner's request indicates that the original copy of his proposal was signed, petitioner failed to include an affidavit verifying that the statements contained in his petition were accurate to the best of his knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.40(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and certification. *See also Amendment of Section 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, n.42 (1990). Petitioner is requested to rectify this omission in his comments.

[2] According to the 1990 U.S. Census, Hudson has a population of 2,374 persons.

[3] The coordinates for Channel 242A at Hudson are North Latitude 31-23-50 and West Longitude 94-46-15. Petitioner proposed coordinates North Latitude 31-20-30 and West Longitude 94-48-30 with a site restriction of 7.12 kilometers (4.42 miles). However, the Commission generally does not protect a prospective applicant's desired transmitter site for a new allotment if a less restrictive is available, as there is no guarantee that the petitioner will ultimately become the licensee. Therefore, we will not consider petitioner's site, and advance a less restrictive site for the allotment of Channel 242A at Hudson, Texas.

served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Wolfe Communications Inc. against TCI Cablevision of Ohio, Inc. CSR-4175-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: January 17, 1995; Released: January 26, 1995

By the Cable Services Bureau:

1. On December 15, 1993, Wolfe Communications, Inc. ("Wolfe"), licensee of low power television station W19BN (Channel 19), Defiance, Ohio, filed a complaint against TCI Cablevision of Ohio ("TCI"), operator of cable television systems serving Bryan, Paulding, and Van Wert, Ohio,[1] claiming that TCI had declined to carry the station even though W19BN is a fully-qualified low power television station within the meaning of §76.56(b)(3) of the Commission's Rules and §§614(c) and (h)(2) of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). TCI responded on February 14, 1994,[2] by alleging that the station did not provide a good quality signal and, that even if it did, complainant does not satisfy the definition of a qualified LPTV station.

DISCUSSION

2. The 1992 Cable Act provides "that a cable operator is not required to carry a low power television station that does not deliver [a good quality signal] to the principal headend of a cable system." *See* 47 U.S.C. §534(h)(1)(B)(iii). Because the cable operator is in the best position to know whether a given station is providing a good quality signal to the system's principal headend, we believe that the initial burden of demonstrating the lack of a good quality signal appropriately falls on the cable operator. In meeting this burden, the cable operator must show that it used good engineering practices, as defined below, to measure the signal delivered to the headend.

3. With respect to the standard to be used to determine what constitutes a good quality signal, the 1992 Cable Act adopted a standard for determining the availability of VHF and UHF commercial stations at a cable system's headend: for VHF commercial television station signals, the standard is -49 dBm; for UHF commercial television station signals, the standard is -45 dBm. Consistent with Congress' guidance with respect to VHF and UHF commercial station availability, we believe it is reasonable to utilize the same standards as prima facie tests to initially determine, absent other evidence, whether VHF or UHF low-power stations place adequate signal levels over a cable system's principal headend.

4. To measure a station's signal to see if it meets the Commission's requirements, a cable operator's signal strength surveys should, at a minimum, include the following: 1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; 2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; 3) height of the antenna above ground level and whether the antenna was properly oriented; and 4) weather conditions and time of day when tests were done. In addition, our rules require that a cable operator must conduct multiple signal quality tests to ensure accurate results and, in turn, provide that testing information to the affected station when there is a dispute over signal level measurements. Generally, if the test results are less than -51 dBm for a UHF station, we have said that at least four readings must be taken over a two-hour period. Where the initial readings are between -51 dBm and -45 dBm, inclusive, we believe that the readings should be taken over a 24-hour period with measurements not more than four hours apart to establish reliable test results.

5. TCI has submitted separate data for the Bryan, Paulding and Van Wert systems, each consisting of six signal level readings taken over the course of a twenty-four hour period. These tests were conducted by TCI's Engineer on February 2 and 4, 1994 for the Bryan system, February 3 and 4, 1994 for the Paulding system, and February 4 and 5, 1994 for the Van Wert system. The data demonstrates, consistent with Commission requirements, that W19BN's signal strength at each of TCI's three principal headends is substantially below the level of -45 dBm required for UHF stations. As a result, W19BN is not eligible for must-carry status on TCI's systems. Given our conclusion, we need not reach the other issues raised by the parties in this matter.

6. Accordingly, the petition filed December 15, 1993, by Wolfe Communications, Inc., IS DENIED, pursuant to §614(h)(2)(F) (47 U.S.C. 534) of the Communications Act of 1934, as amended. This action is taken pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[1] TCI's system serving Bryan, Ohio, includes the city of Bryan, the villages of Archbold, West Unity, Montpelier, Stryker, Edgerton, and Evansport, and the townships of Jefferson, Pulaski, and Center; its system serving Paulding, Ohio, includes the villages of Paulding, and Cecil; its system serving Van Wert, Ohio, includes the city of Van Wert, and Ohio City.

[2] On February 3, 1994, TCI requested a Motion for Extension of Time in which to respond to the complaint. Wolfe had no objection to this request and it was granted pursuant to the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Continental Cablevision of Sierra Valleys, Inc.
Cablevision of Central Florida

CSR-4220-M

Operator of a Cable Television System Serving Visalia/Tulare, Corcoran, Fresno, and Hanford, CA

MEMORANDUM OPINION AND ORDER

Adopted: January 17, 1995; Released: January 26, 1995

By the Chief, Cable Services Bureau:

INTRODUCTION

1. On October 5, 1992, the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act) became law.[1] On March 11, 1993, the Commission adopted a *Report and Order* to implement the mandatory broadcast signal carriage ("must-carry") provisions of the Cable Act.[2] Pursuant to the rules adopted in the *Report and Order*, cable systems were required to commence carriage of local broadcast stations entitled to must-carry status beginning June 2, 1993.[3] On June 17, 1993, local broadcast stations were required to make their initial election of either must-carry or retransmission consent status and notify cable systems of their election.[4] Those broadcast stations which elected must-carry status were required to notify the cable system of their preferred channel position at that time.[5]

SUMMARY OF PLEADINGS

2. On February 15, 1994, The Kralowec Children's Family Trust (Press), licensee of KKAK (TV), filed a complaint against Continental Cablevision of Sierra Valleys, Inc. (Continental) for the latter's alleged failure to comply with the channel positioning requirements of the Commission's Rules and the 1992 Cable Act.

3. KKAK began operating on May 7, 1992. Its over-the-air channel position is 61. According to its complaint, on April 16, 1993 KKAK notified Continental that KKAK met the requirements for must-carry and had elected must-carry status on Continental's system. Continental was advised that KKAK wished to be carried on channel 5 of Continental's system. However, respondent placed KKAK on cable channel 33 in Visalia/Tulare and channel 36 in Corcoran. KKAK argues that it has been placed in a disadvantageous channel position "at variance with the intent of Congress in establishing its channel positioning rules." On December 6, 1993 KKAK again requested that it be carried on channel 5; by letter, Continental rejected that request.[6] Continental, in this instance, basically amplified and expanded its earlier position that the Commission's must-carry rules set out a broadcaster's channel selection options and that a broadcaster's channel preference is not the determinative factor in this instance.

DISCUSSION

4. We address KKAK's claim that it is entitled to be carried on channel 5. The Cable Act and our rules offer three channel options available to broadcast stations electing must-carry: 1) a station may elect to be carried on its over-the-air channel; or 2) on the channel on which it was carried on July 19, 1985; or 3) on the channel on which it was carried on January 1, 1992.[7] The rules also provide that a broadcast station may be carried "on such other channel as is mutually agreed upon by the station and the cable operator."[8] Given that KKAK began operating in May of 1992 and its over the air channel number exceeds the number of channels -- 41 -- on Falcon's system, complainant has interpretedthe language "on such other channel as is mutually agreed upon by the station and the cable operator" as constituting a fourth option that prevents Falcon from unilaterally deciding which channel complainant will occupy. KKAK also believes that where a broadcaster may not take advantage of these three statutorily designated channel options it may not be left to the cable operator to determine where to place the broadcaster.[9] We disagree with complainant's reading of our rules.

5. We read the 1992 Cable Act and the Commission's Rules to unambiguously state that there are three options--not four--available to a broadcaster.[10] The language which allows cable operators and broadcasters to mutually agree upon a different channel is the mechanism by which the two may reach a channel positioning option outside of the three proposed by the 1992 Cable Act's provisions. It is simply a way of saying that the parties have the flexibility to reach a result different from the three statutory options.

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] *Report and Order* in MM Docket 92-259, 8 FCC Rcd 2965 (1993). *See also, Clarification Order*, 58 FR 32449 (June 10, 1993).

[3] 47 C.F.R. § 76.56(a),(b).

[4] 47 C.F.R. § 76.64(f)(1).

[5] 47 C.F.R. § 76.57(d).

[6] International Family Entertainment also filed comments in opposition to KKAK's complaint.

[7] 47 U.S.C. § 534(b)(6); 47 C.F.R. § 76.57(a).

[8] 47 U.S.C. § 534(b)(6); 47 C.F.R. § 76.57(c).

[9] KKAK believes that, for competitive reasons, Continental has placed it on less favorable channels, p. 10-11 of Petition for Special Relief. Complainant believes that our rules give KKAK's channel position preference precedence "over all but the cable operator's technical ability to comply." *Id.* at 13.

[10] *See Report and Order*, 8 FCC Rcd. at 2986. "The election of which of these three alternatives is left up to the station involved." "We also note that the 1992 Cable Act provides three channel positioning options for each commercial station and two for each NCE station, and also provides an opportunity for parties to develop their own solutions to conflicting claims." *Id.* at 2988.

It does not, however, mean that in the event the three options are not available the parties *must* agree on the ultimate placement of the channel. To read this flexibility as a mandatory fourth option would totally obviate the prior three options as broadcasters would clash with other broadcasters in seeking what they viewed as a more favorable channel position, leaving the cable operator in the position of having to choose between competing broadcasters. In the present case, KKAK was initially carried by Continental on channels 33 and 36. Channel 61 is KKAK's over-the-air channel, and KKAK was not in operation on either July 19, 1985 or January 1, 1992. Though the parties were not able to reach a mutually agreeable channel, we find nothing improper with Continental's unilateral assignment of KKAK to channels 33 and 36.

6. KKAK also contends that "Congress clearly indicated its preference for channel choices that limit cable operators' ability to carry local stations on inferior channel positions." It believes that channel's 33 and 36 are outside of what it calls Continental's "de facto broadcast tiers", channels 1-13, and that it is "segregate[ed]" to an end of the viewing band away from the favorable channel positions enjoyed by all other local commercial television stations.

7. We certainly understand KKAK's desire to remain as competitive as possible. However, there is no specific nor implicit requirement that cable operators arrange their basic tier such that some sort of alleged economic equilibrium amongst broadcasters is attained. Inferring such a requirement would complicate channel positioning election beyond anything envisioned by Congress. Thus, we find that Continental has complied with the requirements of the 1992 Cable Act.

8. Accordingly, the petition filed on February 15, 1994, by The Kralowec Children's Family Trust IS DENIED, in accordance with Section 614(b)(6) (47 U.S.C. § 534) of the Communications Act of 1934, as amended. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Acting Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Citrus County	CSR-4227-M
Association for Retarded Citizens	FL0258

against Mickelson Media, Inc.
d/b/a Century Cable

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: January 19, 1995; Released: January 26, 1995

By the Cable Services Bureau:

1. On February 1, 1994, Citrus County Association for Retarded Citizens ("CCARC"), licensee of low power television Station W49AI, Inglis-Yankeetown, Florida, filed a complaint pursuant to Section 76.61 of the Commission's rules claiming that Mickelson Media, Inc. d/b/a Century Cable ("Century"), an operator of a cable television system serving Dunnellon, Florida, refused to carry the station.[1] CCARC's complaint alleges that W49AI is a qualified low power television station within the meaning of Section 76.56(b)(3) of the Commission's rules and, therefore, is entitled to carriage. CCARC requests that the Commission order Century to carry its signal. Century filed an opposition to the petition on March 24, 1994. CCARC responded in a motion to strike Century's Opposition, to which Century responded.

2. In support of its complaint, CCARC argues that W49AI meets all of the qualifying criteria under Section 76.55(d) of the Commission's rules.[2] CCARC states that on November 29, 1993, CCARC notified Century of its obligation to carry W49AI, but Century did not respond to the request for carriage. Subsequently, Century made an oral representation to CCARC that W49AI's signal to the Dunnellon headend was inadequate to permit carriage on the system. Century did not respond to CCARC's request for written confirmation of that assessment nor did Century provide CCARC with a copy of the signal strength survey before the complaint was filed.

3. In its opposition, Century states that the signal test measurements it conducted on May 2 and May 3, 1994,[3] using a Channel Master 5646 broadband antenna indicate that the signal strength level for W49AI at the Dunnellon headend range between -50.55 dBm and -50.85 dBm. Century argues that because the signal quality test results are below the minimum -45 dBm required by the Commission for mandatory signal carriage of a UHF station, CCARC's signal is not qualified for carriage on its system.

4. Section 76.56(b)(3) of the Commission's rules requires the carriage of "qualified" low power television ("LPTV") stations in certain limited circumstances. A LPTV station that conforms to the rules established for LPTV stations in Part 74 of the Commission's Rules will be considered "qualified" only if: 1) it broadcasts for at least the minimum number of hours of operation required under 47 C.F.R. Part 73; 2) it adheres to Commission requirements regarding nonentertainment programming and employment practices[4] and the Commission determines that the programming by the LPTV station would address local news and informational needs which are not being adequately served by full power television broadcast stations because of geographic distance of such full power stations from the low power station's community of license; 3) it complies with interference regulations consistent with its secondary status; 4) it is located no more than 35 miles from the cable system's headend and delivers to the principal headend an over-the-air signal of good quality; 5) the community of license of the station and the franchise area of the cable system are both located outside the largest 160 Metropolitan Statistical Areas (MSA's) on June 30, 1990, and the population of such community of license on that date did not exceed 35,000; and 6) there is no full power television broadcast station licensed to any community within the county or other political subdivision (of a State) served by the cable system.

5. The 1992 Cable Act adopted a standard for a good quality signal of commercial televisions station. The Commission has determined that a television station must deliver to the principal headend of a cable system either a signal level of -45 dBm for UHF signals or -49 dBm for VHF signals to be qualified for carriage. Because the cable operator is in the best position to know whether a given

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[1] CCARC also filed a petition requesting carriage of W49AI on Century's Inglis-Yankeetown, Florida system on February 1, 1994. *See, Citrus County Association for Retarded Citizens against Mickelson Media*, CSR-4226-M, DA 94-1583 (released January 6, 1995).

[2] CCARC states that W49AI: 1) operates 24 hours per week broadcasting from a 19.52 kw transmitter located at north latitude 28°52' 55", west longitude 82°31' 30"; 2) is located within 35 miles of Century's principal headend; 3) is in full compliance with Part 73 of the Commission's rules governing children's programming, political broadcasting and Equal Employment Opportunity; 4) Inglis-Yankeetown, its community-of-license, has a population of less than 35,000 and is not located within the 160 largest metropolitan statistical areas; 5) provides locally-originated programming; and 6) there are no full power television stations licensed to serve the county, in which Dunnellon is licensed.

[3] Century states that it conducted two sets of signal measurement tests. The first set of tests on December 7, 1993 did not conform to the Commission's requirements; however, according to Century, the second series conducted on May 2-3, 1994, did conform. Century claims that both sets of tests show that W49AI's signal strength falls below the minimum standard of -45dBm for a UHF commercial station.

[4] Section 76.55(d)(2) provides that the LPTV station must meet "all obligations and requirements applicable to television broadcast stations under Part 73 of Title 47, Code of Federal Regulations, with respect to the broadcast of nonentertainment programming; programming and rates involving political candidates, election issues, controversial issues of public importance, editorials, and personal attacks; programming for children; and equal employment opportunity; ..." 47 C.F.R. §76.55(d).

station is providing a good quality signal to the system's principal headend, we have stated that the initial burden of demonstrating the lack of a good quality signal appropriately falls on the cable operator.[5] In meeting this burden, the cable operator must show that it has used good engineering practices to measure the signal delivered to the headend.

6. In following sound engineering measurement practices, signal strength surveys should, at a minimum, include the following: 1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; 2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; 3) height of the antenna above ground level and whether the antenna was properly oriented; and 4) weather conditions and time of day when test were done.

7. Generally, if the test results are less than -51 dBm for a UHF station, at least four readings must be taken over a two-hour period. Where the initial readings are between -51 dBm and -45 dBm, inclusive, the readings should be taken over a 24-hour period with measurements not more than four hours apart to establish reliable test results.

8. In this instance, Century determined that W49AI's signal strength at the Dunnellon headend was below the requisite level of -45 dBm for a UHF commercial station. Century's initial reading at the Dunnellon system headend was -50.45 dBm, and subsequent readings over a twenty-four hour period show a range in signal strength between -50.55 and -50.85 dBm.[6] When measured against our criteria for sound engineering practices, we conclude that the data submitted by Century is sufficient to demonstrate that W49AI's signal is not of "good quality" at the cable system's headend.

9. CCARC, in a June 7, 1994 letter to Century, without conceding the validity of the Century's signal testing results, offered to provide at its own expense whatever equipment is reasonably necessary to provide the "FCC-specified minimum signal level at the headend." According to CCARC's letter filed August 2, 1994, Century failed to respond to that offer. While we encourage CCARC's and Century's efforts to negotiate a resolution of their dispute, this offer by CCARC cannot remedy poor signal quality. Neither the 1992 Cable Act nor our rules allow a low power television station to cure a signal quality deficiency with additional equipment as full power television stations are allowed to do.[7]

10. We find that W49AI is not a qualified low power television station under Section 76.55(d) of the Commission's rules because it fails to deliver a good quality signal to the headend of Century's Dunnellon cable system. Accordingly, the complaint filed February 1, 1994, by Citrus County Association for Retarded Citizens IS DISMISSED in accordance with Sections 76.55(d) and 76.56(b)(3) of the Commission's rules.

11. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[5] When there is a dispute over signal level measurements the cable operator must provide the affected station "a list of equipment used to make the measurements, the point of measurement and a list and detailed description of reception and over-the-air signal processing equipment used, including sketches such as block diagrams and a description of the methodology used for processing the signal at issue, in its response." 47 C.F.R. § 76.61(a)(2).

[6] We note that some of Century's measurements are more than four hours apart, however, we believe that the deviation from the timing requirement is de minimis and does not corrupt the reliability of the test results.

[7] In our *Must Carry Report and Order*, we specifically rejected a commenter's suggestion "to extend the provisions of Section 614(h)(B)(iii), which apply on their face to full power television stations, to LPTV stations." *See Broadcast Signal Carriage Issues*, 8 FCC Rcd. 2965, 2991. We noted that "such an interpretation is clearly not intended by Congress in the 1992 Cable Act." *See id.* Thus, only full power television stations, not low power television stations, are allowed to provide additional equipment to remedy an existing signal quality deficiency.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Time Warner Cable	CSR-3906-A
For Modification of Television Broadcast Station WYED's ADI	
Complaint of Group H Broadcasting Corporation against Time Warner Cable	CSR-4082-M
Request for Carriage	

MEMORANDUM OPINION AND ORDER

Adopted: January 19, 1995; Released: January 26, 1995

By the Cable Services Bureau:

INTRODUCTION

1. Time Warner Cable ["Time Warner"], operator of a cable television system serving Fayetteville, North Carolina, and neighboring communities, has filed a petition for special relief (CSR-3906-A) seeking to delete the communities of Autryville, Falcon, Fayetteville, Fort Bragg, Godwin, Hope Mills, Pope Air Force Base, Spring Lake, Stedman, and Wade, North Carolina, and neighboring areas of Cumberland County, North Carolina, from the "area of dominant influence" of Television Broadcast Station WYED (Ind., Channel 17), Goldsboro, North Carolina, which station has as its market the Raleigh-Durham, North Carolina "area of dominant influence." Time Warner's petition is opposed by Group H Broadcasting Corporation ["WYED"], licensee of Television Broadcast Station WYED, and Time Warner has replied. In addition, on September 23, 1993, WYED filed a petition (CSR-4082-M) requesting carriage on Time Warner's cable system. This petition is opposed by Time Warner, and WYED has replied.

BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ["1992 Cable Act"][1] and implementing rules adopted by the Commission in its *Report and Order in MM Docket 92-259*,[2] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[3] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[4]

3. This section of the 1992 Cable Act also provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the 1992 Cable Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as--
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[5]

4. The legislative history of this provision indicates that:

> The provisions of [this subsection] reflect a recognition that the Commission may conclude that a community within a station's ADI may be so far removed from the station that it cannot be deemed part of the station's market. It is not the Committee's intention

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] 8 FCC Rcd 2965, 2976-2977 (1993).

[3] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[4] Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. For a more complete description of how counties are allocated, *see* Arbitron's *Description of Methodology*.

[5] 47 U.S.C. §534(h)(1)(C)(ii).

that these provisions be used by cable systems to manipulate their carriage obligations to avoid compliance with the objectives of this section. Further, this section is not intended to permit a cable system to discriminate among several stations licensed to the same community. Unless a cable system can point to particularized evidence that its community is not part of one station's market, it should not be permitted to single out individual stations serving the same area and request that the cable system's community be deleted from the station's television market.[6]

5. The Commission provided guidance in *MM Docket 92-259, supra,* to aid decision making in these matters, as follows:

> For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.,* rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[7]

6. In adopting rules to implement this provision, the Commission indicated that changes requested should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[8] The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.[9]

MARKET FACTS AND ARGUMENTS OF THE PARTIES

7. *Time Warner Petition for ADI Modification.* The communities in question are located in the central and northern portions of Cumberland County, North Carolina, with the exception of Autryville, which is located just east of Cumberland County, in Sampson County. Both Cumberland and Sampson Counties are part of the Raleigh-Durham, North Carolina ADI, as is Goldsboro, WYED's city of license. Cumberland County is at the southern edge of the ADI. Fayetteville, Time Warner's headend community, is located in the center of Cumberland County, approximately 55 miles southwest of Goldsboro.

8. In support of its petition, Time Warner notes that it does not carry nor has the system ever carried WYED in the communities in question since the station began operations in 1988. While WYED may place a predicted Grade B contour over the communities in question, Time Warner argues that WYED in fact provides no local news or sports coverage to the communities in question, or any other locally oriented programming, unlike the other commercial stations in the ADI.[10] According to Time Warner, "WYED's programming consists primarily of reruns and some first-run syndicated programming." Time Warner notes that WYED is not significantly viewed in either Cumberland County or Sampson County,[11] and cites February 1993 Nielsen data for the Raleigh-Durham Designated Market Area which show that WYED achieved only a 0.1 rating in cable homes and a 0.5 rating in noncable homes.

9. In opposition to Time Warner, WYED argues that its predicted Grade B contour encompasses all of the communities in question. WYED states that its Grade B coverage area is similar to those of Stations WTVD, WRDC, WKFT, WRAL-TV, and WLFL-TV, which Time Warner presently carries. This similarity in coverage area underscores WYED's identity as part of the Raleigh-Durham ADI, the station claims, as do its inclusion in Fayetteville and Raleigh newspapers' local television listings, WYED's inclusion in Raleigh-Durham market surveys by Arbitron and Nielsen, and Fayetteville advertising agencies' purchases of time on WYED to promote Fayetteville events. That Time Warner has refused to carry WYED should be of limited significance to determining WYED's rights, asserts the station. WYED contends that its independent programming provides desirable diversity to the options currently available to Time Warner's subscribers, and cites examples such as Baltimore Orioles baseball games and Raleigh Ice Caps hockey games, as well as series such as "Bonanza," "Hill Street Blues," "The Rifleman," and "The Ed Sullivan Show." WYED also claims that its programming such as "Combat," "Rat Patrol," "The Three Stooges," and various westerns and outdoor and sports programs is designed to appeal to a young male audience, including those stationed at Fort Bragg and at Pope Air Force Base. WYED in addition states that it carries monthly a program about the

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[6] H.R. Rep. 102-628, 102d Cong., 2d Sess. 97-98 (1992).
[7] *MM Docket No. 92-259,* 8 FCC Rcd at 2977.
[8] *Id.* at 2977, 2977 n.139.
[9] 47 C.F.R. §76.59.
[10] These are Stations WTVD (ABC, Channel 11) and WRDC (NBC, Channel 28), both Durham, North Carolina; WKFT (Ind., Channel 40) and WFCT (Ind., Channel 62), both Fayetteville, North Carolina; WRAL-TV (CBS, Channel 5) and WLFL-TV (Fox, Channel 22), both Raleigh, North Carolina; and WRMY (Ind., Channel 47), Rocky Mount, North Carolina. Time Warner submits listings from the May 15-21, 1993 *TV Guide,* Eastern North Carolina edition, to document this argument.
[11] For an independent station to be deemed to be significantly viewed in a community or a county, it must achieve in noncable homes a share of viewing hours of at least 2 percent (total week hours) and a net weekly circulation of at least 5 percent. 47 C.F.R. §76.5(i).

Carolina Mudcats, a Raleigh-area minor league baseball team, and also airs weekly "The Jimmy Swinson Show," which focuses on area clubs and activities. WYED notes that it has sponsored an alcohol-free party for area high school graduates at a Raleigh nightclub, and will be carrying Cumberland County high school football games and a Fayetteville area gospel music show if the station can obtain cable carriage. The station airs area public service announcements,[12] and also plans to begin local weather cut-ins three times a day for the entire ADI. WYED asserts that its poor viewership is due to its lack of cable carriage, which is essential to the station's survival.

10. In reply to WYED, Time Warner notes that the station has failed to refute Time Warner's arguments. Nationally syndicated programming does not constitute local news or other service within the meaning of the 1992 Cable Act, contends Time Warner, nor does WYED's programming focusing on Raleigh and its environs constitute local programming to Time Warner's subscribers.

11. *WYED Carriage Complaint.* In support of its carriage complaint, WYED states that, as a commercial television broadcast station licensed to Goldsboro, North Carolina, it is entitled to carriage on those portions of Time Warner's system that are located within the Raleigh-Durham ADI, unless the station fails to provide an adequate quality signal to Time warner's principal headend in Fayetteville, or if carriage of WYED would cause Time Warner to incur additional copyright liability. WYED submits copies of correspondence demonstrating that Time Warner concedes it can receive an adequate quality signal from WYED at the system's Fayetteville headend, and also that WYED has agreed to indemnify Time Warner for any additional copyright liability resulting from WYED's carriage in communities outside of the Raleigh-Durham ADI that are part of Time Warner's technically integrated system.

ANALYSIS AND DECISION

12. We shall deny Time Warner's petition. We note initially that Time Warner concedes that though it has never carried WYED since the station began operations, Time Warner carries the other commercial licencees in the Raleigh-Durham ADI. This is precisely the situation the 1992 Cable Act was designed to remedy.[13] With regard to the question of service to the communities in question, we have said that will take into consideration evidence that the station does not actually provide coverage or other local service to the particular community or communities.[14] Here, however, the communities in question are within WYED's regular predicted service coverage area. Further, we agree that the similarity of coverage areas between WYED and stations WTVD, WRDC, WKFT, WRAL-TV, and WLFL-TV, which Time Warner presently carries, underscores WYED's and the subject communities' identity as part of the Raleigh-Durham ADI. Despite Time Warner's attempt to show that WYED's minimal local service is not at all particular to Time Warner's communities, we believe that WYED has sufficiently demonstrated that its current and planned programming is in fact designed to serve the needs and interests of the communities in question.[15]

13. While WYED lacks a history of cable carriage in the communities in question , we are not inclined to give this factor great weight in cases in which appreciable off-air viewership of a station is demonstrated. With respect to the question of viewership, WYED claims that its viewership is poor because it lacks cable carriage. However, the station does achieve appreciable off-air viewership. In noncable homes in Cumberland County, though the station's share is not reported, WYED has a net weekly circulation of 7, while in Sampson County, in which Autryville is located, WYED's share in noncable homes is 2 and its net weekly circulation is 19.[16] In fact, WYED's Sampson County figures meet the criteria for being deemed significantly viewed. We note, though, that these data are county-wide, rather than community-specific. We have stated, however, that we shall accept such data as probative, although not conclusive, in cases of this type, absent evidence that such data are not fairly reflective of viewing in the actual communities in question.[17]

14. The portion of the 1992 Cable Act allowing for modification of ADIs "is intended to permit the modification of a station's ADI to reflect its individual situation." *MM Docket 92-259*, 8 FCC Rcd at 2977. In the present case, Time Warner has not sufficiently demonstrated that the communities in question are not part of WYED's ADI.

15. Turning to WYED's complaint against Time Warner, we uphold WYED's complaint. WYED has clearlyestablished that it is entitled to carriage on Time Warner's system. Time Warner concedes that it is capable of receiving an adequate signal from WYED at the system's principal headend, and WYED has agreed to indemnify Time Warner against any increased copyright liability resulting from WYED's carriage.[18]

16. In view of the foregoing, we find that grant of Time Warner's petition is not in the public interest, and that grant of WYED's complaint is in the public interest.

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[12] WYED submits a list of 36 organizations and events for which it has aired public service announcements. The communities in question are represented by three of the announcements.

[13] *See Act III Broadcasting of Nashville, Inc.*, 8 FCC Rcd 8544, 8546 (1993).

[14] *Id.*

[15] That other ADI licensees do in fact provide coverage of and service to the communities in question is not to the contrary. We do not believe that Congress intended this criterion to operate as a bar to a station's ADI claim whenever other stations could also be shown to serve the communities at issue, but rather that this criterion was intended to enhance a station's claim where it could be shown that other stations *do not* serve the communities at issue.

[16] Arbitron, *Television County Coverage: North Carolina* (Cable-Controlled Counties), 1992.

[17] *See, e.g., RKZ Television, Inc.*, 8 FCC Rcd 8008, 8010 (1993).

[18] The pleadings in this proceeding contain a dispute as to meaning of paragraph 46 of the Commission's *Report and Order in MM Docket No. 92-259*, 8 FCC Rcd 2965, 2977 (1993)("During the pendency of a petition before the Commission, cable operators will be required to maintain the status quo with regard to signal carriage."), and the question of what it means with respect to the maintenance of the status quo during the pendency of a ADI modification petition. Having ordered carriage of WYED's signal, we do not believe it necessary to address that dispute further at this time.

ORDERING CLAUSES

17. Accordingly, IT IS ORDERED, pursuant to §614(h)(1)(C) of the Communications Act of 1934, as amended (47 U.S.C. §534(h)(1)(C)) and §76.59 of the Commission's Rules (47 C.F.R. §76.59), That the petition for special relief (CSR-3906-A) filed June 2, 1993 by Time Warner Cable IS DENIED.

18. IT IS FURTHER ORDERED, That the petition (CSR-4082-M) filed September 23, 1993, by Group H Broadcasting Corporation IS GRANTED.

19. IT IS FURTHER ORDERED, That Time Warner Cable SHALL COMMENCE CARRIAGE of the signal of WYED forty-five (45) days from the release date of this *Order* on Time Warner Cable's system serving Fayetteville, North Carolina and neighboring communities.

20. These actions are taken pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Wolfe Communications, Inc. against Times Mirror Cable Television of Defiance, Ohio, Inc. d/b/a Dimension Cable Services — CSR-4203-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: January 18, 1995; Released: January 26, 1995

By the Cable Services Bureau:

1. On January 28, 1994, Wolfe Communications, Inc. ("Wolfe"), licensee of low power television station W19BN (Channel 19), Defiance, Ohio, filed a complaint against Times Mirror Cable Television of Defiance, Ohio, Inc. d/b/a Dimension Cable Services ("Times Mirror"), an operator of systems serving Defiance and Napoleon, Ohio on the grounds that Times Mirror had declined to carry the station, pursuant to Section 76.61 of the Commission's rules. Wolfe's complaint alleges that W19BN is a fully-qualified low power television station within the meaning of Section 76.56(b)(3) of the Commission's rules and, therefore, is entitled to carriage on subject cable systems. Wolfe requests that the Commission order Times Mirror to carry W19BN. Times Mirror filed an opposition on February 24, 1994, to which Wolfe responded.

2. Under Section 76.56(b)(3) of the Commission's rules a cable system that has insufficient full power television signals to reach its channel set aside shall carry at least one qualified low power television ("LPTV") station. A LPTV station that conforms to the rules established for LPTV stations in Part 74 of the Commission's rules will be considered "qualified" only if: 1) it broadcasts for at least the minimum number of hours of operation required under 47 C.F.R. Part 73; 2) it adheres to Commission requirements regarding nonentertainment programming and employment practices and "the Commission determines that the provision of such programming by the station would address local news and informational needs which are not being adequately served by full power television broadcast stations because of the geographic distance of such full power stations from the low power television station's community of license;"[1] 3) it complies with interference regulations consistent with its secondary status; 4) it is located no more than 35 miles from the cable system's headend and delivers to the principal headend an over-the-air signal of good quality; 5) the community of license of the station and the franchise area of the cable system are both located outside the largest 160 Metropolitan Statistical Areas (MSA's) on June 30, 1990, and the population of such community of license on that date did not exceed 35,000; and 6) there is no full power television broadcast station licensed to any community within the county or other political subdivision (of a State) served by the cable system.[2]

3. In support of its petition, Wolfe argues that W19BN meets all of the qualifying criteria under Section 76.55(d) of the Commissions rules.[3] In opposition, Times Mirror asserts that Wolfe is not qualified because with respect to its Napoleon system Wolfe does not deliver a good quality signal to that system's headend[4] and because W19BN's children's programming does not meet the Commission's requirements. Moreover, Times Mirror argues, the local news and information needs of the community are adequately met by several full power television stations in the area.

4. In its complaint, Wolfe states that the programming on W19BN is locally oriented and addresses local news and informational needs. Wolfe maintains that these needs are not adequately met by any full power television stations because of the distance of such stations from the communities at issue.[5] In addition, Wolfe alleges that it meets the Commissions requirements for children's programming.

5. In its opposition, Times Mirror argues that Wolfe failed to demonstrate that its programming satisfies the Commission's requirement for children's programming. Times Mirror argues that W19BN's 20 to 40 second character generated screens do not meet the mandate for standard-length educational and informational children's programming. In addition, Times Mirror states that local news and informational programming needs are met in Defiance and Napoleon by four significantly viewed Toledo ADI full power broadcast stations and a PBS affiliate. Times Mirror asserts that these stations are no more than 55 miles from Defiance and 40 miles from Napoleon and

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[1] Section 76.55(d)(2) provides that the LPTV station must meet "all obligations and requirements applicable to full power television broadcast stations under part 73 of [Title 47, Code of Federal Regulations], with respect to the broadcast of nonentertainment programming; programming and rates involving political candidates, election issues, controversial issues of public importance, editorials, and personal attacks; programming for children; and equal employment opportunity; ..." 47 C.F.R. §76.55(d)(2).

[2] 47 C.F.R. § 76.55(d).

[3] Wolfe states that W19BN: 1) operates 24 hours a day, seven days a week, 365 days a year; 2) meets all obligations and requirements applicable to television broadcast stations under part 73 of the Commission's rules, with respect to programming and equal employment opportunity; 3) complies with interference regulations consistent with its secondary status pursuant to Part 74 of the Commission's rules; 4) is located less than 35 miles from each Times Mirror headend and delivers good quality over-the-air signals; 5) is located, together with the franchise areas at issue, outside the largest 160 Metropolitan Statistical Areas and W19BN's community of license, Defiance, has a population of approximately 18,000; and 6) has no full power television station licensed to Defiance or Henry counties, the counties served by the cable systems at issue.

[4] Times Mirror concedes that W19BN delivers a good quality signal to the headend of its Defiance cable system.

[5] Wolfe states that Defiance, W19BN's community of license, is 55 miles from the Toledo full power television stations, 45 miles from the Lima stations and 45 miles from the Fort Wayne, Indiana stations.

provide public affairs programming covering issues relating to northwest Ohio communities, including Defiance and Napoleon.

6. Wolfe emphasizes in its response that its format of character generated programming benefits children by encouraging them to read. Wolfe argues that its programming "Increase Your Vocabulary", "Riddle" and "Did You Know" are targeted at school age children and are standard length (or longer) relative to all other programming broadcast on W19BN. In addition, Wolfe responds that the informational programming is available 24 hours a day to Northwest Ohio and in greater detail, in contrast to such programming from the full power television stations.

7. We are persuaded by Times Mirror's argument that W19BN does not meet the requirements for children's television programming under Part 73 of the Commissions rules. Under Section 76.671 of the Commission's rules television licensees are required to provide some children's programming.[6] The Commission does not substitute its judgment in the place of broadcasters to determine how they should provide children's programming.[7] The Commission has not established minimum programming requirements,[8] however, we do require that some standard length (at least one half-hour long)[9] programs specifically designed to serve the educational and informational needs of children must be aired to fulfill a broadcaster's obligations under the Children's Television Act of 1991.[10] Wolfe's complaint and supporting documentation indicate that the all children's programming broadcast by W19BN is less than one half-hour in duration. Therefore, we conclude that W19BN fails to meet the Commission's requirements for children's programming. As a consequence, we need not reach the issue as to whether W19BN's programming addresses local news and informational needs that are not being adequately met by other area full power stations because of the distance of those stations from Defiance, Ohio, W19BN's community of license.

8. We find that Wolfe fails to meet the qualifying criterion for children's television programming required under Section 76.55(d) of the Commission's rules and, thus, is not entitled to mandatory carriage on Times Mirror's Napoleon or Defiance cable systems. Therefore, we need not address Times Mirror's allegation that W19BN does not deliver a good quality signal to the principal headend of the Napoleon cable system.

9. We find that W19BN does not meet the requirements for a qualified low power television station. Accordingly, the complaint filed on January 28, 1994, by Wolfe Communications Inc., IS DISMISSED in accordance with Sections 76.55(d) and 76.56(b)(3) of the Commission's rules.

10. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

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[6] 47 C.F.R. § 73.671. Educational and informational television programming is any television programming that furthers the positive development of children 16 years of age and under in any respect, including the child's cognitive/intellectual or emotional/social needs. *Id.* note. *See also Policies and Rules Concerning Children's Television Programming, Report and Order*, 6 FCC Rcd 2111, 2114 (1991).

[7] *See Id.* at 2115 ("Licensees will retain reasonable discretion to determine the manner in which they assess the educational and informational needs of children in their communities, provided that they are able to demonstrate the methodology used.").

[8] *Id.*

[9] *See Policies and Rules Concerning Children's Television Programming, Notice of Inquiry*, 8 FCC Rcd 1841, 1842 n.12. ("Standard-length programs are generally understood to be at least on half-hour long.")

[10] *Policies and Rules Concerning Children's Television Programming, Memorandum Opinion and Order*, ("*Children's Television Reconsideration Order*") 6 FCC Rcd 5093, 5101 (1991); *Policies and Rules Concerning Children's Television Programming, Memorandum Opinion and Order*, ("*Children's Television Second Reconsideration Order*") 7 FCC Rcd 3197 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-172

In the Matter of

Amendment of Section 73.202(b),	RM-7726
Table of Allotments,	RM-7800
FM Broadcast Stations.	RM-7801
(Cushing and Cleveland, Texas)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 19, 1995; Released: January 26, 1995

By the Chief, Allocations Branch:

1. At the request of Cavalier Broadcasting ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 3630 (1991), proposing the allotment of Channel 245A to Cushing, Texas, as the community's first local FM service.

2. In response to the *Notice*, Texas Classical Radio, Inc. ("Texas Classical"), permittee of Station KRTK(FM), Cleveland, Texas, and petitioner filed counterproposals.[2] Roy E. Henderson, Richard E. Foster, petitioner and Texas Classical filed responsive comments to the counterproposals. Petitioner and Texas Classical filed reply comments. Texas Classical filed further comments.[3] After the close of the comment period, petitioner filed comments withdrawing its expressions of interest in both its original proposal and counterproposal.[4] After the close of the comment period, Texas Classical filed a request for partial withdrawal of its documents and Roy E. Henderson filed a motion to withdraw its comments.[5]

3. In its counterproposal, Texas Classical requests the substitution of Channel 246C for Channel 246C1 at Cleveland, Texas, as the community's second aural transmission service.[6] Texas Classical submits that, as a Class C facility, KRTK-FM's proposed 1.0 mV/m contour would provide service to a larger population.

4. We believe the public interest would be served by the substitution of Channel 246C for Channel 246C1 at Cleveland, Texas, since it could provide the community with an additional wide coverage area FM service. In light of petitioner's withdrawal, we need not compare the benefits of a new allotment at Cushing against the benefits of improved service at Cleveland. Channel 246C can be allotted to Cleveland in compliance with the Commission's minimum distance separation requirements and can be used at the transmitter site specified in Station KRTK-FM's construction permit.[7] As proposed, we will also modify Station KRTK-FM's authorization to specify operation on Channel 246C in accordance with the provisions of Section 1.420(g) of the Commission's Rules.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 17, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Cleveland, Texas	246C

6. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Texas Classical Radio, Inc.,

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[1] The community of Cleveland has been added to the caption.

[2] Public Notice was given of these counterproposals on September 11, 1991, Report No. 1860 (RM-7797 and RM-7798), as corrected by Public Notice of September 17, 1991, Report No. 1860 (RM-7800 and RM-7801).

[3] Texas Classical filed a motion to accept the further comments, as they were untimely filed. We need not discuss these comments, in light of the outcome of this proceeding.

[4] Petitioner withdrew its petition for rule making supporting the allotment of Channel 245A, as well as its counterproposal requesting the allotment of Channel 245C3, at Cushing. No other party expressed an intention to apply for either channel. Therefore, the comments and responses relating to the Cushing allotments will not be discussed and the proposals will be dismissed. Petitioner's request for dismissal of its proposals are in accordance with Section 1.420(j) of the Commission's Rules. We hereby grant the withdrawal request and all pleadings relating to the petitioner's proposals are now moot.

[5] Texas Classical requested withdrawal of its comments and reply comments to the extent that language in the pleadings contains factual or legal allegations of misconduct against the sole proprietor of Cavalier Broadcasting. Henderson and Texas Classical's motions to withdraw were filed pursuant to a settlement agreement. Affidavits were filed by David W. Nichols, a corporate officer of Texas Classical and Roy E. Henderson stating that no consideration was received in exchange for their withdrawals pursuant to Section 1.420 of the Commission's Rules.

[6] We note that this counterproposal was mutually exclusive with one portion of a counterproposal filed by Fayette Broadcasting (RM-7264) in MM Docket No. 89-459, requesting the substitution of Channel 247A for Channel 222A at New Ulm, Texas. However, the New Ulm portion of Fayette Broadcasting's counterproposal was unaccepted for consideration when filed, and comment was not sought on the New Ulm channel substitution. *See* Public Notice dated February 6, 1990 (Report No. 1807). The remainder of Fayette Broadcasting's counterproposal was ultimately rejected by the Commission. *See Re port and Order* (MM Docket No. 89-459), 8 FCC Rcd 1557 (1993).

In addition, Classical's counterproposal to substitute Channel 246C for Channel 246C1 at Cleveland was also mutually exclusive with a portion of a counterproposal filed in MM Docket 90-90 by Fort Bend Broadcasting Company, Inc. proposing to substitute Channel 247A for Channel 222A at New Ulm, Texas. However, that counterproposal was withdrawn, thereby eliminating the conflict.

[7] The coordinates for Channel 246C at Cleveland are North Latitude 30-32-06 and West Longitude 95-01-05.

for Station KRTK-FM, Cleveland, Texas, IS MODIFIED to specify operation on Channel 246C, in lieu of Channel 246C1, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

7. Pursuant to Commission Rule Section 1.1104(1(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and /or upgrade. As a result of this proceeding, Texas Classical Radio, Inc., permittee of Station KRTK-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

8. IT IS FURTHER ORDERED, That the petition for rule making of Cavalier Broadcasting, seeking the allotment of Channel 245A to Cushing, Texas, (RM-7726), IS DISMISSED.

9. IT IS FURTHER ORDERED, That the counterproposal filed by Cavalier Broadcasting, seeking the allotment of Channel 245C3 to Cushing, Texas, (RM-7800), IS DISMISSED.

10. IT IS FURTHER ORDERED, That this proceeding is TERMINATED.

11. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202) 418-2173.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

WT Docket No. 95-11

In the Matter of the

Application of

HERBERT L. SCHOENBOHM
Kingshill, Virgin Islands

For Amateur Station
and Operator Licenses

HEARING DESIGNATION ORDER

Adopted: January 18, 1995; Released: January 30, 1995

1. Mr. Herbert L. Schoenbohm has applied for renewal of his amateur service station and operator licenses. For the reasons stated below, his application will be designated for a hearing to determine whether the application shall be granted.

2. In *Government v. Schoenbohm*, No. Crim: 1991/0108 (D.V.I. Dec. 30, 1992), Mr. Schoenbohm was convicted in the U.S. District Court for the District of the Virgin Islands (District Court) of violating 18 U.S.C. § 1029(a)(1) (fraudulent use of counterfeit access device).[1] The District Court sentenced Mr. Schoenbohm to imprisonment for a term of two months. The District Court suspended execution of this sentence and placed Mr. Schoenbohm under house arrest for two months with two years probation. The District Court also required Mr. Schoenbohm to pay a fine of $5,000 during the probation period. Mr. Schoenbohm started serving his sentence on January 11, 1993.

3. On appeal, the U.S. Court of Appeals for the Third Circuit "affirmed Mr. Schoenbohm's conviction. *United States V. Schoenbohm*, No. 93-7516 (Third Circuit July 22, 1994). On November 2, 1994, the U.S. Court of Appeals for the Third Circuit denied Mr. Schoenbohm's petition for a rehearing. *United States V. Schoenbohm*, No. 93-7516 (Third Circuit November 2, 1994).

4. In view of the criminal conviction described above, it appears that Mr. Schoenbohm lacks the requisite qualifications for a renewal of his amateur service licensee. Certainly, his conviction for fraudulently using a counterfeit access device (to obtain long distance telephone service) is relevant to evaluating the likelihood that he will comply with the Commission's Rules as a licensee in the amateur service. *See Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1183 (1986), *recon.*, 1 FCC Rcd 421,424 (1986), *appeal dismissed sub nom. National Association for Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. June 11, 1987), *as modified*, 5 FCC Rcd 3252, 3253 (1990) [to cover nonbroadcast licensees], *recon.*, 6 FCC Rcd 3448 (1991).

5. IT IS ORDERED, under Section 309(e) of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. § 309(e), that the application of Herbert L. Schoenbohm to renew his amateur station and operator licenses IS DESIGNATED FOR HEARING; and that the issues thereupon will be the following:

(a) To determine whether, in light of the conviction described above, Herbert L. Schoenbohm is qualified to renew his amateur service licenses.

(b) To determine, in light of the foregoing issue, whether granting Herbert L. Schoenbohm's application would serve the public interest, convenience and necessity.

6. IT IS FURTHER ORDERED that, under Section 309(e) of the Act, 47 USC § 309(e), the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the respondent as to all issues.

7. IT IS FURTHER ORDERED that a copy of this Order shall be sent to the respondent by Certified Mail -- Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Myron C. Peck
Deputy Chief, Enforcement Division
Wireless Telecommunications Bureau

[1] Section 1029 provides, in pertinent part, that whoever "knowingly and with intent to defraud uses one or more counterfeit access devices . . . shall, if the offense occurs in interstate or foreign commerce, be punished as provided . . . ." It defines an "access device" as "any plate, card, code, account number, or other means of access that can be used . . . to obtain money, goods, services or any other thing of value . . . ."

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-510

In re applications of

RAMON RODRIGUEZ AND ASSOCIATES, INC. File No. BPH-821208AA

DAVID ORTIZ RADIO CORPORATION File No. BPH-830722AL

For a construction permit
for a new FM station in Lajas,
Puerto Rico

MEMORANDUM OPINION AND ORDER

Adopted: January 19, 1995; Released: January 30, 1995

By the Commission:

1. We have before us an application for review of the Supplemental Decision of the Review Board in this case, 9 FCC Rcd 3275 (1994), filed by David Ortiz Radio Corp. on August 9, 1994, and an opposition filed by Ramon Rodriguez and Associates, Inc. (RRAI) on August 24, 1994.

2. The Commission has held that RRAI's application merits more comparative credit than that of Ortiz, assuming that both are basically qualified, 5 FCC Rcd 4041 (1990), but hearing issues were later specified concerning the basic qualifications of both applicants following a judicial remand. See *David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253 (D.C. Cir. 1991). In supplemental decisions based on the evidence taken at the remand hearings, the ALJ and the Review Board concluded that RRAI is fully qualified but that Ortiz is disqualified for misrepresenting facts to the Commission. 9 FCC Rcd 3275 (Rev. Bd. 1994); 8 FCC Rcd 2461 (ALJ 1993). Ortiz contends in its application for review that the supplemental decisions are wrong on all counts and therefore urges us to absolve it of the misrepresentation finding and find RRAI disqualified instead. We have considered all of the arguments that Ortiz raises and will respond to those that warrant discussion.

RRAI Misrepresentation Issue

3. One of the character issues to be resolved is whether RRAI deliberately deceived the Commission in certifying in an amendment filed on March 18, 1983 that it still had reasonable assurance of the availability of its proposed antenna site and in filing a request to withdraw that amendment on July 7, 1983.[1] As found in the lower decisions, the relevant facts are as follows.

4. The antenna site that RRAI originally specified in its application, which was filed on December 8, 1982, was a tract of land in an area known as Cerro Guaniquilla. The possibility of specifying that site had occurred to Ramon Rodriguez Guzman, RRAI's president and 50 percent owner, upon learning that Ortiz had specified it in its initial application. After hearing from residents in the vicinity that the tract belonged to the government, Guzman contacted employees of the National Resources Agency (NRA) who confirmed that information and advised him that permission to use the tract could be sought by application to the agency's San Juan office. According to Guzman's testimony, one of the employees assured him that the tract was available for use as a transmitter site. Guzman submitted an application for a permit for the proposed use to the NRA's San Juan office on November 18, 1982 and paid the applicable filing fee. Although the land-use application was still pending at the time, Guzman testified that he was reasonably certain when RRAI filed its FM application on December 8th that the Cerro Guaniquilla tract would be available for use as an antenna site, as he had learned from reliable informants that it was government-owned and as he knew that Ortiz was specifying the site in its application, from which he inferred that Ortiz had obtained a permit to use the site for that purpose and hence that RRAI would be able to secure one, too.[2]

5. Later in the same month, *i.e.*, December 1982, an official of the NRA told Guzman that the tract was privately-owned, but, on subsequently searching through records at the Registry of Property in Mayaguez, Guzman found documents indicating that the land in question belonged to a governmental agency called the Conservation Trust of Puerto Rico. An NRA employee agreed in a later conversation with him that the tract might belong to the Trust. On January 10, 1983 Guzman visited Francisco Javier Blanco, the Director of the Conservation Trust, who confirmed that the Cerro Guaniquilla tract was under the Trust's jurisdiction but who told Guzman that it could not be used for an antenna site because it was to be developed as a bird sanctuary.

6. According to Guzman's testimony, however, he was not convinced from the meeting with Blanco that the site was unavailable. He testified that he had been skeptical of Blanco's statements in that regard for several reasons: because David Ortiz was also proposing to install an antenna at that site; because others had previously told him that the

[1] No question is presented here as to whether RRAI deliberately misrepresented the status of the site in its original application. The ALJ concluded in a summary decision that RRAI had not tried to deceive the Commission in that regard when it filed the application, and that determination was affirmed by the Commission and the Court of Appeals. 4 FCC Rcd 6817 (Rev. Bd. 1989), *rev. den.* 5 FCC Rcd 4041 (1990); 941 F.2d at 1258.

[2] The official application form in use when the applications at issue in this case were filed did not require the signatory to provide the name and telephone number of the person contacted to obtain reasonable assurance that the proposed antenna site would be available to the applicant. The Commission later revised the form to require such information, several years after the occurrance of the events in question here. *Amendment of Sections 73.3572 and 73.3573 Relating to Processing of FM and TV Broadcast Applications*, 58 RR 2d 776, 782 ¶22 (1985).

tract belonged to the NRA or to a private owner; because the Mayaguez land records were not up to date; and because his brother later reported having learned from a Forestry official that the tract belonged to Codremar, an NRA subsidiary. Guzman accordingly testified that he had directed further inquiries about ownership of the Cerro Guaniquilla tract to NRA employees at various times after the meeting with Blanco. He admitted, though, that while pursuing those inquiries he had also begun to look for an alternative site due to uncertainty as to the ownership of the one at Cerro Guaniquilla.

7. On March 18, 1983 RRAI filed an amendment to change its proposed city of license from Cabo Rojo to Boqueron. The amendment indicated that RRAI still intended to install its transmitter at the Cerro Guaniquilla site. In a letter dated June 5, 1983 RRAI's engineering consultant informed Guzman that a site change was advisable in the interest of improving coverage and recommended that he look for a suitable site in an area called Penones de Melones. Ortiz Rem. Exh.3. Later in the same month Guzman obtained a letter in which the owners of land in that vicinity declared that they were willing to lease it to RRAI. On July 7, 1983, Guzman filed a request to withdraw the amendment of March 18. The withdrawal request made no explicit representation about the antenna site. In August 1983 RRAI filed an amendment to change its proposed antenna site from Cerro Guaniquilla to Penones de Melones.

8. The ALJ held that Guzman and RRAI had not acted with intent to deceive when filing the amendment in March indicating that RRAI still intended to use the site in Cerro Guaniquilla or in filing the withdrawal request in July. He rested the holding on two main premises: first, that the evidence indicated that Guzman had still believed at those times that the Cerro Guaniquilla site was available to RRAI for the proposed use; and second, that there was no evident motive for RRAI to have deceived the Commission as to the availability of that site, in any event. 8 FCC Rcd at 2466 ¶ ¶ 42 and 44-47. He based the first premise, in turn, on these grounds: (a) Guzman's testimony that he continued to inquire about the ownership of the site after the meeting with Blanco bears out his testimony that he doubted the latter's assertion that it belonged to the Conservation Trust; (b) there is no evidence that Blanco disclosed the basis for that assertion to Guzman; (c) evidence that Guzman did not begin to look for a new site until June 1983[3] lends credence to his testimony that he still believed in March 1983 that the original site was available; and (d) a former applicant in this proceeding, F.M. Minority Broadcasting, specified the Cerro Guaniquilla site in an application filed in April 1983, and Ortiz specified it again when refiling its application in July of that year. Finding, moreover, in light of facts reported in a site amendment that Ortiz filed in October 1985 that Blanco's agency did not own the Cerro Guaniquilla tract, the ALJ remarked that this information "tends to justify Rodriguez' [Guzman's] decision to doubt Blanco's judgment." As regards the premise that there was no motive for deceit, the ALJ stressed that the time allowed for amending as of right had yet to expire when RRAI filed the March amendment and the July 7 withdrawal request and hence observed that, if Guzman had believed that the site was unavailable, he could have so informed the Commission without adverse consequences while seeking a new one.

9. The Review Board conceded in response to exceptions that Guzman's testimony on one relevant point was contradicted by evidence that one of the individuals that he had allegedly contacted at the NRA after his meeting with Blanco had not been employed at that agency in 1983, in light of which the Board discounted that particular testimony, attributing the discrepancy to faulty recollection on Guzman's part. 9 FCC Rcd at 3276 ¶11. The Board otherwise agreed with the ALJ, however, that Guzman's testimony was credible and that it amply supported the finding that Guzman and RRAI still believed when filing the amendment re-specifying the Cerro Guaniquilla site and the withdrawal request that the site was available.

10. We agree with the Review Board and the ALJ that, looking at the record in its entirety, a preponderance of the evidence indicates that RRAI did not intend to deceive the Commission as to material facts when it made the submissions in question, in March and July of 1983. There are two pertinent contentions in the application for review that warrant discussion. First, Ortiz disputes the finding that there was no motive for deceit. Citing *Dutchess Communications Corp.*, 101 FCC 2d 243, 254 (1985), it contends that RRAI had reason to fear that its application would be dismissed if it were to report that it had lost assurance that its specified antenna site would be available. Second, Ortiz contends that Guzman and RRAI should be disqualified for lying in hearing testimony, referring to Guzman's contradicted testimony that he had questioned a certain individual at the NRA about ownership of the Cerro Guaniquilla tract after having met with Blanco.

11. As to Ortiz' first contention, we agree with the ALJ that there was no motive for deceit. Contrary to the appellant's assertion, there is no inconsistency between this finding and the holding in *Dutchess*. The pertinent distinction is that the applicant that was disqualified in *Dutchess* for lack of a transmitter site had reported the loss of its original site after the expiration of the time for amending as of right and failed to show good cause for acceptance of its amendment specifying a new site, whereas RRAI was not at risk of being dismissed because the relevant events in this case all occurred prior to the deadline for amending as of right. It simply could have designated another site if it believed that the original site was no longer available.

12. Nor do we find merit in the contention that Guzman should be found to have lied in testifying that he had met with an NRA employee named Angel David Gonzalez in 1983 after his meeting with the Director of the Preservation Trust. Although it seems that the testimony in question was incorrect, as Ortiz produced evidence that no one named Angel David Gonzalez was employed at the NRA in 1983, it is not clear that Guzman uttered it with an intent to deceive. Nearly ten years had elapsed since the meeting with Blanco when Guzman testified at the remand hearing, and he admitted that his recollection as to the dates of his later meetings with NRA employees, the details of those conversations, and the employees' identities was hazy. As Ortiz does not point to any evidence that shows that the

[3] See, in addition to the testimony on point cited by the ALJ, Ortiz Rem. Exh. 3 and RRAI Rem. Exh. 1, Attachment C.

inaccuracy was due to something other than an honest mistake, we agree with the Board that there is no basis for concluding that this testimony was deceitful.

RRAI Abuse of Process Issue

13. Another issue on which evidence was taken at the remand hearing is whether Juan Carlos Rodriguez Maldonado, who is the son of RRAI's president and fifty-percent owner and who holds one percent of its stock in his own name, impersonated an FCC employee in order to obtain evidence against Ortiz.

14. According to undisputed findings, Maldonado, accompanied by a friend named Juan Esquerado, went to a photographer's shop to hire the proprietor to take pictures that could be presented to show that the facilities of David Ortiz's AM station in Cabo Rojo (WEKO) were co-located with the facilities of his daughter's FM station (WMIO). The photographer, a man named Ortiz Postigo, was a cousin of David Ortiz and advertised on the latter's AM station. The witnesses agree that, when Maldonado solicited his services, Postigo asked him whether he had permission from David Ortiz to photograph the station, that Maldonado replied that it was not necessary to get permission, that Postigo refused the request, that Maldonado and Esquerdo then left the shop, and that Maldonado returned later on the same day for the same purpose and was again rebuffed.

15. The testimony concerning other details of these encounters is contradictory. Maldonado testified (RRAI Rem. Exh.2, pp. 2-3) that he had introduced himself to Postigo by name, but Postigo denied this in an affidavit (Ortiz Rem. Exh.8, p.5) and testified (Tr. at 678, 682, and 690) that he had learned the visitor's name later from David Ortiz, who had allegedly identified him from a description of the visitor's appearance that Postigo gave Ortiz after the encounters. Maldonado and Esquerdo each testified that the latter had accompanied Maldonado on the second visit, moreover, whereas Postigo alleged that Maldonado had returned alone. The principal subject of controversy, though, is what Maldonado said during the second encounter. Maldonado testified that on the second visit he had explained to Postigo that he was associated with RRAI, that RRAI had filed an application for a radio station with the FCC, and that he consequently needed photographs to show that David Ortiz had two stations in the same place. He also alleged that he had told Postigo that he was a member of Andino's Trio, a well-known singing group, and that Postigo had admitted that his face looked familiar.

16. According to Postigo, however, Maldonado asserted on the second occasion that he was from the FCC. Postigo averred that he had then asked Maldonado for proof of his identity, that Maldonado had not complied, and that he, Postigo, had therefore declined to answer any questions. Postigo denied, moreover, that Maldonado had identified himself as associated with RRAI or as a member of Andino's Trio and also denied having told Maldonado that he recognized him. On the other hand, Esquerdo corroborated Maldonado's account of the second visit and added that Maldonado had never said or implied to Postigo that he was an agent or employee of the FCC.

17. In agreement with the ALJ, the Review Board concluded that the evidence does not support a finding that Maldonado had impersonated an FCC employee. 9 FCC Rcd at 3278 ¶ ¶ 19-21. Ortiz contends that this holding should be reversed in light of several considerations. First, it maintains that Maldonado's credibility as a witness is tainted by a prior false statement, referring to the court's observation in *David Ortiz Radio Corp. v. FCC, supra,* that Maldonado had admitted in an affidavit that, when he had requested the public file of the radio station licensed to Ortiz's daughter and was asked by a station employee what company he represented, he had replied that he was not a representative of any company. 941 F.2d at 1261. (Unlike Ortiz, the court did not maintain that the affidavit detracts from Maldonado's credibility but rather that it tends to indicate that he was acting as an agent of RRAI when he visited Postigo's shop, which is undisputed.) The Board held that the admission does not detract from Maldonado's credibility because it was not "developed on the record" and is not germane to the formally-specified hearing issues, but Ortiz contends that this ruling is erroneous. Without regard to the scope of the hearing issues, we agree with the Board's conclusion that this circumstance does not materially detract from the credibility of Maldonado's testimony. The admission that he gave a false reply to a question in an informal conversation in order to conceal an affiliation that he had no obligation to disclose does not support a finding that Maldonado has a penchant for lying while testifying under oath subject to penalty for perjury.

18. Next, Ortiz argues that Maldonado's hearing testimony that he had explained to Postigo that RRAI was involved in an FCC licensing proceeding should be discredited because there is no mention of any such comment in an account of the incident that Maldonado gave in an affidavit filed in 1988, after the abuse of process question was first raised. There is no conflict, however, between Maldonado's hearing testimony and his 1988 affidavit, in which he denied having identified himself to Postigo as an FCC employee and asserted that he had instead told him that he was an agent of RRAI and a member of Andino's Trio. RRAI Rem. Exh.2, Attachment A. The mere fact that he added a relevant detail in his direct testimony that is not mentioned in a consistent prior affidavit sworn before the abuse of process issue was specified does not establish that his testimony was deceitful in that respect.

19. Finally, Ortiz disputes the Board's finding that Postigo was uncertain and self-contradictory in testifying as to what Maldonado had told him about his relationship with the FCC. 9 FCC Rcd at 3278 ¶ ¶ 19-20. Even assuming that his statements could be construed as consistent in that respect, Postigo's admitted inability to recall Maldonado's exact words detracts considerably from the reliability of his testimony as to the gist of the latter's remarks on point, as a fair reading of the record suggests that the divergence in their testimony in this regard is merely due to a misunderstanding on Postigo's part as to whether Maldonado had indicated that he had a case at the FCC, as opposed to saying that he was from the FCC.

20. Also, as the Board noted, Maldonado's version of the facts is fully corroborated by the testimony of Esquerdo, a witness with no apparent stake in the outcome of the case. Furthermore, we agree with the Board that the testimony of Ortiz's cousin, Postigo, that Maldonado posed as an FCC official during their second encounter does not square well with undisputed testimony that he had previously told Postigo that there was no need to obtain permission to photograph the station's facilities or with the undisputed testimony that Maldonado was a member of a well-known local performing group. *Id.* at ¶ ¶ 19-20. Finally, we note that Postigo's testimony that he learned Maldonado's name from David Ortiz is squarely contradicted by Ortiz, who repeatedly testified in a deposition that *Postigo* had told

him the man's name. RRAI Rem. Exh. 6, pp. 44 and 55. We therefore conclude that the Board ruled correctly in upholding the ALJ's resolution of the abuse of process issue in RRAI's favor.

Ortiz Misrepresentation Issue

21. The court did not indicate in its remand order that there was any need for investigation as to Ortiz's basic qualifications. Mindful, however, of the court's admonition against ignoring conflicts in paper statements, 941 F.2d at 1261, the Commission determined after reassuming jurisdiction of the case that a further hearing issue should be added concerning the veracity of an affidavit from David Ortiz that was materially contradicted by sworn statements of a non-party witness. 7 FCC Rcd at 2634 ¶ ¶ 9-10. The pertinent circumstances are as follows.

22. On May 2, 1988, in a supplement to a petition to add a hearing issue as to whether David Ortiz surreptitiously controlled operation of WMIO(FM), a radio station licensed to his daughter, RRAI submitted an affidavit alleging that David Ortiz had offered to hire the affiant, Jorge Morales Gonzague, as the program director at WMIO(FM). More specifically, Morales alleged that he was currently employed by Miguel Deynes Soto, a member of the Puerto Rican Senate; that he had gone to WEKO on March 2, 1988 to look for a tape of a speech in which the Governor of Puerto Rico had spoken in favor of Sen. Soto; that he had encountered David Ortiz's son, Wilkins Ortiz, at the station, and that Wilkins had given him a copy of the tape; that after receiving the tape he had had a conversation with David Ortiz, in the course of which the elder Ortiz had offered him a job; that on April 18, 1988 David Ortiz had "formally" offered him the position of program director at WMIO(FM); that the affiant had agreed to meet with David Ortiz on the 25th or 26th of the same month to discuss details of the employment, but that the affiant had not kept the appointment, having decided in the interim to continue working for Sen. Soto.

23. In a sworn declaration filed with the FCC on May 17, 1988, David Ortiz denied that he had offered Morales a job at his daughter's station. Ortiz averred that Morales had called WEKO several times in March 1988 asking to speak with him but had been unable to reach him because in each instance he was either absent or too busy to take the call; that Morales had walked into his office unannounced about a week after the last call, introduced himself, alluded to Ortiz' application for a permit for an FM station at Lajas, and confided that he would like to work for Ortiz at the proposed station in the event Ortiz got the permit; that Morales had said in support of this proposition that he was currently working for Sen. Soto but had prior experience in broadcasting as a salesman; that Ortiz had not offered him a job but had promised to contact him if the FCC were to grant his FM application; and that they said goodbye at that point and Morales left. Ortiz averred, moreover, that he had never met Morales on any other occasion; that Morales had said nothing during the meeting about a tape of a speech by the Governor in favor of Sen. Soto; that after having been apprised of Morales' allegations he had spoken with Sen. Soto in a conference telephone call, to which his attorney and Sen. Soto's interpreter had also been privy; that the senator had told him that the speech to which Morales had referred in his affidavit had been delivered by the Governor in Hormigeros in late February of 1988; and, finally, that he, David Ortiz, had determined from a review of WEKO's logs conducted by his staff that the station had not broadcast that speech. Ortiz Rem. Exh. 9, Attachment 1.

24. RRAI presented a second sworn statement from Morales at the ensuing remand hearing, in 1992. Morales alleged in his second affidavit, which is dated May 16, 1988, that one Manuel Feliciano, identifying himself as the president of the Caribbean Detective Bureau and Academy, Inc., had approached him in Sen. Soto's office on May 9, 1988, indicating that he wanted to speak with Morales and that his purpose had something to do with "a conflict over radio stations," one of which was in Cabo Rojo (the location of WEKO(AM) and WMIO(FM)). Morales also alleged in the affidavit that Feliciano had indicated that he wanted information about Morales' movements and that "he was making an approach because the person that he was representing was a very nice person and didn't care for money"; that Feliciano had refused to divulge the name of his client at that point; that they had agreed to meet again at noon on the following day but Feliciano had not kept the appointment; and that Feliciano left in a car with a Puerto Rico license plate marked 81-V-409. In response to questions from the ALJ about the incident, Morales testified at the hearing that Feliciano had told him that his client would be generous if Morales would "do the right things" and that Feliciano had spoken the remark within the hearing of two persons aside from himself: *viz.*, a member of Sen. Soto's staff named Dennys Gonzalez and someone named Acevedo. Tr. at 784-85.

25. Ortiz admitted that he had hired Feliciano and had instructed him to contact Morales but denied having authorized the detective to offer him money. When first asked to explain *why* he had hired Feliciano, during the course of a pre-trial deposition session, Ortiz replied that he had done so because he had been apprehensive of Morales in light of the latter's brash intrusion into his office and that he had therefore wanted to "find out what kind of person he was, if he was really an announcer or somebody else who probably -- who may cause me any damage or any kind of hazard or something like that." RRAI Rem. Exh.6 at pp. 70-71. Likewise, when the examiner asked shortly afterward why he had wanted to find out what kind of person Morales was, Ortiz answered, "Strictly because he jumped into my office in a way, in a position that a gentleman shouldn't do it that way . . . ." At the hearing, however, Ortiz amplified the explanation. While reaffirming that he had hired Feliciano to investigate Morales due to concern about his own security, Ortiz also testified that he had done so because his attorneys had advised him to hire someone to find out whether Morales had a criminal record that could be used for purposes of impeachment in this proceeding. Tr. at 883-84, 895-96. Finally, Ortiz simply averred in this regard in a post-hearing declaration that he had hired Feliciano, on the advice of counsel, to investigate Morales "as a result of the allegations Morales Gonzague had made about me", without reaffirming his original explanation to the effect that he had hired the detective because he feared that Morales might pose a threat to his physical security. Ortiz Rebuttal Exh. 4, ¶ 4.

26. Although RRAI did not dispute Ortiz' assertion that WEKO(AM) had not broadcast the Governor's speech from Hormigueros, it produced an affidavit at the remand hearing from an official of the Popular Democratic Party named Hector Colon, alleging, *inter alia*, that the affiant had attended a meeting of an organization called Las Da-

mas Populares on February 7, 1988 in Mayaguez, that the Governor had delivered a speech at the meeting in which he had endorsed a number of political candidates, including Sen. Soto, and that the meeting had been broadcast by WEKO(AM). Along with the affidavit from Hector Colon RRAI also produced bills from WEKO(AM) for broadcasting the meeting, addressed to Las Damas Populares and to the Popular Democratic Party, and a report to the Puerto Rican State Electoral Commission signed by David Ortiz which listed the coverage of the meeting of Las Damas Populares as one of the political broadcasts that aired on WEKO(AM) in February 1988.

27. Ortiz objected to admission of the affidavit from Hector Colon because the affiant was not present for cross examination, but the ALJ accepted it on the understanding that Ortiz was free to depose Hector Colon and then move to strike the affidavit in light of the deposition testimony. Instead of deposing Hector Colon, though, Ortiz produced an affidavit in which David Ortiz declared that in light of Hector Colon's assertions he had listened to a taperecording of the broadcast of the Damas Populares meeting on February 7, 1988 on file at WEKO(AM) and had thereby ascertained that the station had, in fact, transmitted a speech by the Governor in the context of its broadcast of the meeting but that the Governor had not mentioned Sen. Soto in the speech. Ortiz alleged, moreover, that an attached exhibit was an accurate transcript of the speech as recorded in the station's tape of the broadcast. The ALJ refused to admit the transcript in evidence, however, because Ortiz had not deposed Hector Colon and because the transcript did not cover the entire broadcast.

28. The ALJ and the Review Board concluded that David Ortiz's explanation for hiring Feliciano, his denial of the allegation that he had offered Morales a job at WMIO(FM), his sworn statements that WEKO(AM) had not broadcast a speech in which the Governor had endorsed Sen. Soto, and his and his son's testimony that Morales had neither requested nor received a tape of such a broadcast when he visited their station were false and deceitful. 8 FCC Rcd at 2467 ¶ ¶ 55-59; 9 FCC Rcd at 3280-81 ¶ ¶ 31-34. Consequently they held that Ortiz is disqualified.

29. In appealing from this adverse holding, Ortiz objects, in the first place, to the finding that WEKO(AM) had broadcast a speech by the Governor that included an endorsement of Sen. Soto, arguing that the Board erred in refusing to consider the transcript that Ortiz had offered to prove that the Governor had not mentioned Sen. Soto in the February 7, 1988 speech. We think that there was good reason for the ALJ and the Board to disregard the proffered transcript, however. It reflected only a portion of the entire broadcast and was not supported by an offer of the taperecording itself, which was in Ortiz's sole possession when it submitted the transcript.

30. Ortiz also maintains, for a variety of reasons, that Morales' testimony is not credible. Implying that Morales was motivated by loyalty to Ramon Rodriguez and his son, Ortiz contends that hearing testimony reveals that he was a "long-time friend and associate" of theirs, but the contention is contrary to the weight of the evidence. See Tr. 662-63, 751-54, and 790-91. David Ortiz, on the other hand, as a party obviously had a substantial interest in the outcome of this case. More specifically, in weighing his testimony about his meeting with Morales against Morales' conflicting account, it should be borne in mind that, while it has not been shown that Morales had any ulterior motive for testifying as he did, David Ortiz plainly had a substantial self-interested motive for contradicting Morales' account of their meeting in March 1988, which posed serious questions concerning Ortiz's qualifications to be a licensee of the proposed facility.

31. Ortiz asserts that Morales could not accurately describe Wilkins Ortiz, despite having testified that Wilkins Ortiz had given him the tape of the Governor's speech. Morales testified under cross examination that Wilkins Ortiz had apparently weighed about 160 or 170 pounds and seemed to be about five feet six or seven inches tall at the time of their alleged encounter at WEKO(AM) in March 1988, whereas at a hearing session in September 1992 Wilkins Ortiz described himself as weighing 220 pounds and standing five feet eight inches tall. Tr. at 761 and 906-908. The slight discrepancy between the height estimates is immaterial, however, and the difference between the weight estimates is of dubious significance because Wilkins Ortiz admitted that he had gained weight during the past four years and because his estimate of his weight at the time of the hearing is uncorroborated. In short, it cannot be ascertained from the record that Morales' description of Wilkins Ortiz as he appeared in March 1988 was so inaccurate as to belie his testimony about having received a tape from him.

32. Nor, contrary to another of Ortiz's contentions, does RRAI's inability to produce the tape at the hearing discredit Morales' testimony. Morales testified that the tape had been erased by re-recording pursuant to routine administrative practice of Sen. Soto's staff. Tr. at 758. That testimony is plausible, as nearly two months elapsed between the day when Morales allegedly obtained the tape and the day when he signed his first affidavit and as it is not evident that there was any reason for anyone to have taken special measures to preserve the recording during that interval. Ortiz points out that Morales' testimony about receiving a tape is at odds with David Ortiz's testimony that it was against station policy at WEKO(AM) to give out copies of tapes except on written request and in exchange for payment of a standard fee, but Ortiz's testimony in that regard is self-serving and uncorroborated.

33. Ortiz asserts that Morales' testimony on material points should be discredited because the record shows that he lied in testifying that David Ortiz had been the director of the Notiuno network and that they had agreed to meet for a second time on April 25 or 26, 1988. The record shows that Morales and Ortiz contradicted each other on both points but not that Morales lied in either respect. Morales testified that he had worked for six years as a news announcer at WUNO, an all-news radio station in San Juan that produced all the news programming for the 13-station Notiuno network; that David Ortiz had sometimes visited the station and had exchanged greetings with Morales and the other on-duty employees on those occasions; and that Ortiz was Notiuno's director for some period of time during Morales' tenure as a news announcer. Tr. at 768-71 and 780-81. Morales did not allege, however, that Ortiz had ever supervised him or had any conversation with him while visiting WUNO, nor did he say when or for how long Ortiz had been the director of the network or what grounds he had for believing that Ortiz had, in fact, served in that position, as no one questioned him on those points during cross examination. While denying that he had ever held a position at the network itself, Ortiz acknowledged that WEKO(AM), of which he is the controlling owner, is a Notiuno affiliate. Tr. at 839. He did not say whether he had visited WUNO and was not asked whether

he had done anything, or knew of any circumstances, that might have fostered an impression that he was, at some point, in charge of the network. It cannot fairly be found from this evidence that Morales lied. Assuming that Ortiz was never a director of the network, it is obviously possible, in light of the relevant testimony, that Morales testified otherwise merely because he was mistaken, and Ortiz gives no reason for concluding that the testimony in question was intentionally false. As for Morales' testimony about the alleged appointment for April 25th or 26th, it is contradicted only by uncorroborated testimony from David Ortiz that is no more credible on its face than what Morales asserted in that regard.

34. Ortiz objects, moreover, to the admission of Morales' testimony about Feliciano's remarks to him. The Board ruled that it had been properly admitted for purposes of rebuttal. 9 FCC Rcd at 3281 ¶33. Ortiz asserts in its application for review that it was not offered as rebuttal evidence but rather as part of RRAI's direct case. Further, it contends that the testimony is inadmissible hearsay because Feliciano died before RRAI introduced a statement from Morales in this regard and thus that Ortiz had no chance to cross-examine the declarant.

35. We need not reach this question because we agree with the lower decisions that David Ortiz's testimony about his reason(s) for hiring Feliciano is inherently implausible. Although Ortiz contends that the Board mischaracterized that testimony, its findings in this regard are well-supported by the hearing record, including the transcript of David Ortiz's pre-hearing deposition. The indications that Ortiz did not tell the whole truth about Feliciano's mission are manifold. To begin with, as the lower decisions rightly stress, his original explanation that he had hired Feliciano because he was fearful of Morales in light of his intrusion into his office does not square with evidence showing that he did not engage the detective until after RRAI had filed Morales' first affidavit, which occurred at least two months after the encounter.[4] Nor does it square with Ortiz's deposition testimony that he had not expected to hear from Morales again after their encounter. RRAI Rem. Exh.6, p.82. The admitted fact that Ortiz made no inquiry about Morales to the police or to Senator Soto also tends to belie that explanation. Tr. at 890. Finally, none of David Ortiz's explanations account for the admitted fact that he directed Feliciano to approach Morales. Ortiz could hardly have expected Feliciano to reliably ascertain by questioning Morales himself whether Morales had a criminal record or whether his representations to Ortiz about his current and prior employment had been truthful. When specifically asked by a cross-examiner why he had directed Feliciano to contact Morales, Ortiz replied, "to find out why he visited me for," (Tr. at 896-97) which explanation does not comport with Ortiz's previous representations that Morales had plainly indicated that his motive for the visit was to solicit employment. The evident speciousness of Ortiz's explanations for hiring Feliciano and instructing him to contact Morales clearly has an important bearing on the central issue concerning the veracity of David Ortiz's account of his meeting with Morales.

36. In view of all of these circumstances, we affirm the conclusion that Ortiz is not qualified to be a licensee.

37. Having concluded that RRAI is qualified to be a licensee and that Ortiz is not, we reaffirm our earlier action granting a construction permit for a new FM station serving Lajas, Puerto Rico to RRAI. See 5 FCC Rcd 4041 (1990), affirming 4 FCC Rcd 6817 (Rev. Bd. 1989). Hence, the Emergency Petition for Rescission of Construction Permit that Ortiz has filed and related pleadings are moot and will be dismissed without furthe. consideration.

38. ACCORDINGLY, IT IS ORDERED that the application for review filed by David Ortiz Radio Corporation on August 9, 1994 IS DENIED and that the Emergency Petition for Rescission of Construction Permit filed on December 24, 1992, the Petition to Dismiss or Deny filed on April 8, 1993, the Motion to Accept Supplement to Emergency Petition filed on September 20, 1993, and the Motion to Accept Further Supplement filed on February 1, 1994 by David Ortiz Radio Corporation ARE DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[4] Morales said in his first affidavit that his encounter with David Ortiz had occurred on March 2, 1988. RRAI Rem. Exh.4. David Ortriz averred that he had hired Feliciano in light of Morales' "allegations against me", which establishes that the hiring occurred after May 2, 1988, when RRAI filed the first Morales affidavit. The lower decisions found, in any case, that there was a two-month lag between the encounter and the hiring of Feliciano, and Ortiz does not dispute that finding. 8 FCC Rcd at 2467 ¶58; 9 FCC Rcd at 3280 ¶33.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of KRCA(TV), CSR-4232-M
Fouce Amusement Enterprises, Inc,
against MultiVision Cable TV

Request for Carriage

In re:

MultiVision Cable TV CSR-4201-M

For Modification of Station
KRCA(TV)'s ADI

MEMORANDUM OPINION AND ORDER

Adopted: January 19, 1995; Released: February 2, 1995

By the Cable Services Bureau:

INTRODUCTION

1. On January 25, 1994, ML Media Partners, L.P., trading as MultiVision Cable TV ("MultiVision") filed a "Petition for Emergency Special Relief" from section 75.56 of the Commission's must-carry rules seeking to exclude Fouce Amusement Enterprises, Inc., licensee of commercial television station KRCA(TV) (Ind., Channel 62, Riverside, California) ("KRCA") from must-carry status on MultiVision's Hermosa Beach/Manhattan Beach cable system (the "System"). (CSR-4201-M). An opposition to this petition was filed February 24, 1994, on behalf of KRCA, to which MultiVision replied on March 7, 1994.

2. On March 14, 1994, in a separate but related proceeding, KRCA filed a complaint to enforce the Commission's cable must-carry rules and to require the carriage of KRCA by MultiVision on the System. (CSR-4232-M). An opposition to this complaint was filed by MultiVision on April 20, 1994.[1] On April 12, 1994, KRCA filed a reply to MultiVision's opposition.

BACKGROUND

3. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ["1992 Cable Act"][2] and implementing rules adopted by the Commission in its *Report and Order in MM Docket 92-259*,[3] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[4] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[5]

4. This section of the 1992 Cable Act also provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the 1992 Cable Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as--
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[6]

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[1] On March 28, 1994, MultiVision incorrectly filed, under File CSR-4201-M, to MultiVision's Petition for Emergency Special Relief, a response to the complaint filed by KRCA. On April 20, 1994, MultiVision corrected this error by refiling the response under the correct File CSR-4232-M.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] 8 FCC Rcd 2965, 2976-2977 (1993).

[4] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §72.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADI's to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[5] Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. For a more complete description of how counties are allocated, *see* Arbitron's *Description of Methodology*.

[6] 47 U.S.C. §534(h)(1)(C)(ii).

5. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.
>
> * * * * *
>
> [This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[7]

6. The Commission provided guidance in *MM Docket 92-259, supra*, to aid decision making in these matters, as follows:

> For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.

Id. at 2977 (emphasis in original).

7. In adopting rules to implement this provision, the Commission indicated that changes requested should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[8] The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.[9]

Facts and Arguments of the Parties

8. KRCA is a commercial television station licensed to Riverside, California. Riverside, Hermosa Beach, and Manhattan Beach are all within the Los Angeles ADI. MultiVision's Hermosa Beach and Manhattan Beach, California System has approximately 50 channels in operation, of which fewer than 17 are in use for the retransmission of other local commercial television stations. *See* Exh. A to Complaint.

9. In its complaint, KRCA contends that MultiVision has violated section 76.56 of the Commission's Rules by refusing to commence carriage of KRCA as a local commercial television station on the System. KRCA maintains that on April 30, 1994, the System refused KRCA's initial request for carriage, citing signal quality problems and potential copyright liability. *See* Exh. B to Complaint. KRCA argues that it has complied with all prerequisites for mandatory carriage of its signal on the System. KRCA contends that when the Commission adopted the *Report and Order* in MM Docket 93-207,[10] it specifically added Riverside to the Los Angeles hyphenated market, thereby eliminating any potential copyright liability for carriage of KRCA. *See* Exhibit C to Complaint. KRCA notes that it informed MultiVision on December 9, 1993, of the implications of the *Report and Order*. KRCA states that on December 23, 1993, it requested a meeting with the System to resolve the last remaining issue of signal quality, and that on January 11, 1994, signal strength was tested at MultiVision's Hermosa Beach and Manhattan Beach headend as +14 dbmv [-35dBm] on MultiVision's existing antenna system. KRCA emphasizes that +14 dbmv [-35dBm] is in excess of the minimum signal strength required for a station to qualify for carriage pursuant to the Commission's must-carry rules. *See* Exh. E to Complaint. Finally, KRCA contends that on January 12, 1994, it again requested carriage on the System but that MultiVision failed to respond to the request.[11] Instead, it states, MultiVision filed a Petition for Emergency Special Relief from section 75.56 of the commission's must carry rules (CSR-4201-M) on January 15, 1994, which is also the subject of this Order.

10. MultiVision's response to KRCA's complaint contends that prior to the Commission's decision adding Riverside to the Los Angeles hyphenated market, it filed a petition seeking emergency special relief from the must-carry rules as applied to its Hermosa Beach/Manhattan Beach cable system. MultiVision argues that during the pendency of its petition, the and Commission rules require it to maintain the status quo with regard to signal carriage.[12] MultiVision maintains, therefore, that contrary to KRCA's allegations, it has not violated Section 76.56 of

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[7] H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).
[8] *MM Docket 92-259*, 8 FCC Rcd at 2977, 2977 n.139.
[9] 47 C.F.R. §76.59.
[10] *Report and Order, Amendment of Section 76.51 of the Commission's Rules to Include Riverside, California, in the Los Angeles-San Bernardino-Corona-Fontana, California, Television Market*, DA 93-1444 (1993).
[11] KRCA notes that the System failed to respond within the 30-day period required by § 76.61(a)(2) of the Commission's Rules.
[12] *Report and Order, Broadcast Signal Carriage Issues*, MM Docket 92-259, 8 FCC Rcd. 2965, ¶ 46 (Adopted March 11, 1993, Released March 29, 1993).

the Commission's Rules by refusing to carry the station. In support of its contention that KRCA's complaint should be dismissed, MultiVision relies on the arguments it made in its Petition for Emergency Special Relief (CSR-4201-M). In that Petition, MultiVision contends that the System should be exempt from the must-carry requirements because Riverside is a distinct community with different needs and interests from the market served by the System. *See* ¶ ¶ 12-13, *supra*.

11. In its reply to MultiVision's opposition, KRCA contends that MultiVision fails to dispute that KRCA meets all current prerequisites for mandatory carriage on its system, and therefore, MultiVision must comply with the Commission's must-carry requirements. KRCA also notes that MultiVision's Opposition is based on its misperception that the Commission's *Report and Order* in Docket 93-207 modified the Los Angeles ADI by adding Riverside to the hyphenated market, when in fact, the *Report and Order* only modified the Section 76.51 designation of the Los Angeles hyphenated market, which, at the time of the Commission's order, had the effect of eliminating KRCA's copyright liability.

12. As stated previously, in MultiVision's January 25, 1994 Petition, MultiVision references the Commission's December 7 , *Report and Order*, which added Riverside to the Los Angeles hyphenated market, in support of its contention that KRCA's complaint should be dismissed, stating that "[p]ursuant to this order, KRCA(TV) would ordinarily become eligible for must-carry status with MultiVision's Hermosa Beach/Manhattan Beach cable system ... thirty days after publication of notice in the Federal Register..." MultiVision argues that the Commission's order also gave MultiVision the right to petition to defeat the must-carry status of KRCA. *Citing* 58 Fed. Reg. 67694 at ¶ 5 (Dec. 22, 1993).

13. In support of its petition, MultiVision argues that the System should be exempt from the must-carry requirements or otherwise relieved of its obligation to carry KRCA because such requirements are "contrary to the concept of localism on which the must-carry rights established by Congress are based." Petition at 4. In addition, it argues that because the System's "maximum technical channel capacity" is being utilized, it would be forced to carry the "less desirable" programming of KRCA over programming requested by MultiVision's subscribers. Petition at 3. MultiVision also contends that because KRCA is programming in a foreign language format it "provides no meaningful local coverage or service to the community." *Id.* at 4. Furthermore, MultiVision states that, as shown by the survey of MultiVision's subscribers, there is no demonstrated demand for KRCA's programming. *See* Attachment A to Petition. Finally, MultiVision argues that the First Amendment requires the grant of this petition because "[t]he application of the must-carry rules to KRCA(TV)'s status on MultiVision's Hermosa Beach/Manhattan Beach cable system would clearly inhibit the exercise by MultiVision of editorial discretion consistent with its status as a First Amendment-protected 'speaker.'" Petition at 6.

14. In response, KRCA argues that MultiVision does not justify excluding KRCA from must-carry status on MultiVision's cable systems. KRCA maintains that in accordance with the Commission's regulations it provides local service to the Hermosa Beach/ Manhattan Beach cable communities by placing a predicted City Grade signal over the communities. *See* Exhibit 1. In addition, KRCA asserts that it provides service to these communities through its Asian-language news and entertainment programming, and its English-language public affairs and children's programs; and the fact that a station broadcasts "general issue-responsive" rather than "community specific" programming cannot support deleting a local same-ADI community from the station's market.[13] Furthermore, KRCA contends that MultiVision has failed to meet its burden of proving the necessity of a waiver of the Commission's must-carry rules with regard to KRCA. In addition to failing to provide support for its assertion that KRCA provides no meaningful local coverage or service, KRCA asserts that the evidence MultiVision has provided to show subscriber's lack of desire for KRCA to be added to carriage is misrepresented, flawed, and incomplete. Finally, KRCA notes that MultiVision's assertion that the petition should be granted on First Amendment grounds is without merit. KRCA cites Turner Broadcasting System, Inc. v. FCC, 819 F. Supp. 32 (D.D.C. 1993), in which the court rejects the argument that the Commission's must-carry rules violated the First Amendment. Opposition at 8.

15. In its March 7, 1994 Reply, MultiVision contends that KRCA conceded that it can not meet the standards set out by the Commission regarding historical carriage and viewing patterns. MultiVision argues that a change in programming format, as claimed by KRCA, should not excuse KRCA from the Commission's standards regarding the provision of service which is of interest to MultiVision's Hermosa Beach and Manhattan Beach subscribers.

Analysis and Decision

16. We shall grant KRCA's complaint and request to enforce the Commission's must-carry rules, and deny MultiVision's petition for emergency special relief from Section 75.56 of the Commission's must-carry rules.

17. Given, that KRCA has adequately shown that it is a local commercial television station delivering a good quality signal over the system's principal headend, whose programming does not substantially duplicate the signal of another local commercial television station that is carried on the cable system, and because KRCA is located within the Los Angeles ADI (as determined by reference to Arbitron's 1991-92 *Television Market Guide*), KRCA is entitled to carriage on that portion of MultiVision's system located in the relevant ADI. Accordingly, as the party seeking a modification of the Los Angeles ADI,

[13] KRCA argues that two of the statutory factors that may be considered by the Commission in modifying an ADI -- history of carriage and viewing patterns within the areas served -- are not applicable in this instance. KRCA claims that its prior carriage and viewing history are not relevant because it only began broadcasting its current format in mid-1993. In the alternative, KRCA notes that to the extent historical carriage of other stations located in the same area is to be considered, MultiVision has apparently carried stations from Anaheim, Santa Ana and Corona, which are contiguous to Riverside. See Petition, Attachment B.

MultiVision bears the burden of showing that "the public interest would be served by the grant . . . of the request." 47 C.F.R. § 76.79(f).

18. Rather than provide evidence disputing the validity of KRCA's must-carry claim or evidence that it has met its must-carry obligations, MultiVision instead relies upon its Petition for Special Relief from the Commission's must carry requirements.[14] In light of the fact that Riverside is located within the Los Angeles ADI, we will treat MultiVision's Petition as a request for a modific ation of the station's ADI. As stated in KRCA's Opposition to MultiVision's Petition, MultiVision is wrong in its assertion that the *Report and Order* in Docket 93-207[15] added Riverside to the Los Angeles ADI. Riverside has always been in the Los Angeles ADI, along with Hermosa Beach and Manhattan Beach. The only effect of the *Report and Order* was to change the Commission's 1972 designation of the market, which, at the time of the Commission's order was largely relevant to the issue of copyright liability.

19. The Cable Act allows the Commission to include or exclude particular communities from a television station's market to ensure that a television station is carried in the areas which it serves and which form its economic market. Apart from a subscriber survey which is out of date and does not adequately represent the viewing habits/desires of the citizens of the subject communities, MultiVision has introduced no evidence which would warrant KCRA's deletion from the Los Angles ADI. The survey submitted by MultiVision was from 1992, rather than a more recent period, and KRCA's format has changed significantly since that point in time. MultiVision's survey is, therefore, not probative with regard to KRCA's current programming. In addition, the survey only reflects the opinions of MultiVision's subscribers. The subscribers do not yet receive KRCA and are, therefore, unable to form an opinion regarding the programming provided by KRCA. The Commission has specifically stated that a measure of the viewing patterns in the cable community includes both cable and noncable homes.[16] Moreover MultiVision has failed to introduce any evidence regarding the remaining criteria setout in paragraph 4 above.

20. Although it does not bear the burden in this instance, KRCA has introduced evidence reflecting the local nature of its service to the communities at issue. First, as indicated by the January 12, 1994 letter to MultiVision (attached to Complaint as Exh. E) and the March 1993 contour map (attached to KRCA's Opposition to Petition for Emergency Special Relief at Exh. 1), the signal strength testing conducted at MultiVision's Hermosa Beach and Manhattan Beach headend was recorded at +14 dbmv, equating to a City Grade signal. This signal strength is in excess of the signal strength required for "must carry" status. In addition, despite arguments to the contrary presented by MultiVision, KRCA has shown that it does provide service to these communities through its programming. *See* Exh. 2, attached to KRCA's Opposition to Petition for Emergency Special Relief.

21. Consequently, we find that KRCA is entitled to must carry rights on MultiVision's cable system. Furthermore, we also find that KRCA's deletion from the Los Angles ADI with respect to its carriage on MultiVision's cable system is not in the public interest.

22. Accordingly, IT IS ORDERED, that the Petition for Special Relief filed by MultiVision Cable TV (CSR-4201-M) IS DENIED.

23. IT IS FURTHER ORDERED, that the complaint filed by KRCA (CSR-4232-M) IS GRANTED.

24. IT IS FURTHER ORDERED, that MultiVision Cable TV SHALL CARRY the signal of Station KRCA in compliance with this *Order* within forty-five (45) days of its release date on its system serving Hermosa Beach and Manhattan Beach, California.

25. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[14] We note that the constitutionality of the must-carry rules was upheld by the District Court for the District of Columbia in *Turner Broadcasting Systems, Inc. v. FCC*, 819 F. Supp 32 (D.D.C. 1993) and that enforcement of the rules has not been stayed during the continuation of that litigation, therefore, no challenge to the constitutionality of these rules is appropriate here.

[15] *Report and Order*, DA 93-1444 (1993).

[16] *Report and Order*, 8 FCC Rcd 2965 at 2977, ¶ 47.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-15

In the Matter of

Amendment of Section 73.202(b), RM-8574
Table of Allotments,
FM Broadcast Stations.
(Pago Pago, American Samoa)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 24, 1995; Released: January 30, 1995

Comment Date: March 24, 1995
Reply Comment Date: April 10, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the request of Oceania Broadcasting Network, Inc. ("petitioner"), seeking the allotment of Channel 226C1 to Pago Pago, American Samoa, as its second local FM channel.[1] Petitioner states that it will apply for the channel, if allotted.

Technical Summary

2. Channel 226C1 can be allotted to Pago Pago in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2]

3. We believe the public interest would be served by proposing the allotment of Channel 226C1 to Pago Pago since it could provide the community with its second local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Pago Pago, American Samoa	221C3	221C3, 226C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 24, 1995**, and reply comments on or before **April 10, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Christopher J. Racine, President
Oceania Broadcasting Network, Inc.
970 North Kalaheo Avenue
Suite C314
Kailua, Hawaii 96734
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

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[1] The Commission earlier proposed the allotment of Channel 226C1 to Pago Pago in connection with the deletion of Channel 266C1 there in order to accommodate a new co-channel station authorized by the independent nation of Western Samoa. *See* MM Docket 94-26, 9 FCC Rcd 1545 (1994). While the Commission rescinded the decision in MM Docket 94-26 (59 FR 65295, December 19, 1994), we have accepted Oceania Broadcasting's comments expressing an intention to apply for Channel 226C1 at Pago Pago as a new petition for rule making.

[2] The coordinates for Channel 226C1 at Pago Pago are -14-16-41 South Latitude and 170-42-09 West Longitude.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-14

In the Matter of

Amendment of Section 73.202(b) RM-8552
Table of Allotments,
FM Broadcast Stations.
(Leavenworth, Othello and
East Wenatchee, Washington)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: January 24, 1995; Released: January 30, 1995

Comment Date: March 24, 1995
Reply Comment Date: April 10, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Ronald A. Murray, d/b/a Murray Broadcasting ("petitioner"), permittee of Channel 249A, Leavenworth, Washington, proposing the substitution of Channel 266A for Channel 249A at Leavenworth and the modification of Station KLVH(FM)'s construction permit accordingly.[1] To accommodate the substitution, petitioner also proposes the downgrade of Channel 248C1 to Channel 248C3 at Othello, Washington, and the substitution of Channel 249A for Channel 266A at East Wenatchee, Washington.[2] Petitioner states his intention to apply for the channel, if allotted.

2. In support of its proposal, petitioner states that pursuant to *Report and Order* (MM Docket No. 92-242, 8 FCC Rcd 850 (1993)), Station KLVH(FM) was issued a construction permit (File No. BPH-930423MF) for Channel 249A at Leavenworth, Washington. Petitioner also states that pursuant to *Report and Order* (MM Docket 91-114; 6 FCC Rcd 6476(1991)), Station KYSN(FM)'s license was modified to specify Channel 266A at East Wenatchee, Washington. Petitioner submits that Station KLVH(FM)'s construction permit for Channel 249A at Leavenworth was granted on the assumption that Station KZLN-FM would be upgraded from Channel 248C3 to Channel 248C1 at Othello, Washington, and that Station KYSN(FM)'s license would be modified from Channel 249A to Channel 266A in East Wenatchee to accommodate the upgrade. However, petitioner claims that the upgrade was never effectuated and that Station KYSN(FM) has not received reimbursement for costs in changing frequency. In fact, petitioner asserts that although Station KZLN-FM's permittee, P-N-P Broadcasting, Inc. ("P-N-P"), requested and was granted authority to operate on Channel 248C1, effective December 23, 1991, it did not file an FCC Form 301 for a construction permit for the channel.[3] As a result, on June 10, 1993, the Commission sent P-N-P a letter advising that unless it filed an FCC Form 301 application for a construction permit for Class C1 facilities within 30 days, it could result in P-N-P being made a party to an allocation rule making seeking to downgrade the allotment. P-N-P was also notified that the application would take precedent if filed before any conflicting rule making was initiated. If filed after a rule making petition, P-N-P was informed that the application would be subject to the outcome of the rule making proceeding. P-N-P did not file a Form 301 to upgrade Station KZLN-FM to Class C1 facilities. Therefore, petitioner deems that P-N-P has abandoned its interest in the Class C1 allotment at Othello. Furthermore, petitioner claims that although Station KYSN(FM)'s license was modified to specify operation on Channel 266A at East Wenatchee, the station is still operating on Channel 249A, thereby precluding petitioner from conducting program tests on Channel 249A at Leavenworth. Petitioner alleges that Station KYSN(FM)'s has not moved to the new channel because of P-N-P's failure to reimburse the station for changing frequency. Therefore, in order to resolve the conflict, petitioner urges the Commission to adopt its proposal.

3. Generally, whenever an existing licensee or permittee is ordered to change frequencies to accommodate a new channel allotment, Commission policy requires the benefitting party, or parties, to reimburse the affected station for costs incurred. *See Circleville, Ohio*, 8 FCC 2d 159 (1967). Here, petitioner asserts that Station KYSN(FM) has not changed to Channel 266A and is still operating on Channel 249A. Therefore, petitioner states that it is not required to reimburse Station KYSN(FM) for any costs incurred in changing frequency. However, if Station KYSN(FM) can establish costs that directly concern the frequency change, then it could claim reimbursement and petitioner must state its willingness to do so. *See Burkesville and Russell Springs, Kentucky, Cookeville and Spencer, Tennessee*, 5 FCC Rcd 677 (1990). Petitioner requests that the FM Table of Allotments be amended to accurately reflect Channel 249A in lieu of Channel 266A at East Wenatchee.

4. We believe the public interest would be served by proposing the substitution of Channel 266A for Channel 249A at Leavenworth, Washington, and the modification of Station KLVH(FM)'s construction permit accordingly, in order to eliminate the conflict with Station KYSN(FM) at East Wenatchee, and to enable Station KLVH(FM) to com-

[1] On September 7, 1994, Station KLVH(FM) was granted special temporary authority ("STA") (File No. 940822WW) to operate on Channel 266A on program test authority until resolution of the instant rule making proceeding. The STA expires on March 7, 1995.

[2] An application for the assignment of the license for Station KYSN(FM) at East Wenatchee, from Sunbrook Wenatchee, L.P. to Sunbrook Communications has been accepted for filing (File No. BALH-941116GT).

[3] We note that by letter dated March 26, 1992, Station KZLN-FM informed the Commission that it was in the process of gathering information and preparing an application to implement the class C1 upgrade. However, Station KZLN-FM was cautioned that although the letter indicates a continuing interest in upgrading, such letters are informational only and do not exempt Station KZLN-FM from the possible consequences of continued delay in filing its Form 301 application.

mence operation. The Class A station would provide the community with its first local aural transmission service. In order to accommodate the substitution, we also propose the downgrade of Channel 248C1 to Channel 248C3 at Othello, Washington, and the modification of Station KZLN-FM's construction permit accordingly; the substitution of Channel 249A for Channel 266A at East Wenatchee, Washington, and the modification of Station KYSN(FM)'s license accordingly. An engineering analysis has determined that Channel 266A can be allotted at Leavenworth in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction at petitioner's presently authorized site.[4] Additionally, Channel 248C3 can be allotted to Othello in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[5] Channel 249A can be allotted to East Wenatchee in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[6] Since Leavenworth, Othello and East Wenatchee are located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence by the Canadian government has been requested.

5. Accordingly, we will seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Leavenworth, Washington	249A	266A
Othello, Washington	248C1	248C3
East Wenatchee, Washington	266A	249A

6. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, P-N-P Broadcasting, Inc, permittee of Station KZLN-FM, Othello, Washington, and Sunbrook Wenatchee, L.P., licensee of Station KYSN(FM), East Wenatchee, Washington, SHALL SHOW CAUSE why Station KZLN-FM's construction permit and Station KYSN(FM)'s license SHOULD NOT BE MODIFIED to specify operation on Channels 248C3 and 249A, respectively, as proposed herein instead of the present Channels 248C1 and 266A, respectively .

7. Pursuant to Section 1.87 of the Commission's Rules, P-N-P Broadcasting, Inc. and Sunbrook Wenatchee, L.P., may, not later than March 24, 1995, file a written statement showing with particularity why their license or construction permit should not be modified as proposed in the *Order to Show Cause*. The Commission may call on P-N-P Broadcasting, Inc. and/or Sunbrook Wenatchee, L.P., to furnish additional information. If P-N-P Broadcasting and/or Sunbrook Wenatchee., L.P., raise a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, P-N-P Broadcasting, Inc. and Sunbrook Wenatchee, L.P., will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

8. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to the following:

Duane J. Polich, President
P-N-P Broadcasting, Inc.
P.O. Box 2869
Othello, Washington
99344-2869
(Permittee of Station KZLN-FM)

Larry Roberts, President
Sunbrook Wenatchee, L.P.
N. 1212 Washington St.,
Suite 124
Spokane, Washington 99201
(Licensee of Station KYSN(FM))

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before **March 24, 1995**, and reply comments on or before **April 10, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Melodie A. Virtue
Haley, Bader & Potts
4350 North Fairfax Drive, Suite 900
Arlington, Virginia 22203-2633
(Counsel for Petitioner)

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are

[4] The coordinates for Channel 266A at Leavenworth are North Latitude 47-35-32 and West Longitude 120-38-35.
[5] The coordinates for Channel 248C3 at Othello are North Latitude 46-45-55 and West Longitude 119-16-49.
[6] The coordinates for Channel 249A at East Wenatchee are North Latitude 47-22-52 and West Longitude 120-17-16.

advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Viacom Cable	CUID Nos. CA0092,
Redding, California System	CA0095, CA0096

Benchmark Filings to Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: December 30, 1994; Released: January 3, 1995

By the Chief, Cable Services Bureau:

INTRODUCTION

1. Here we consider complaints about the price Viacom Cable ("Viacom") was charging for its cable programming service ("CPS") tier in Anderson, California, CUID No. CA0092; Shasta County, California, CUID No. CA0095; and Redding, California, CUID No. CA0096. Viacom has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This order addresses the reasonableness of Viacom's prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

PROCEDURAL MATTERS

4. The first valid CPS complaints in the franchise areas addressed in this Order were completed and served on Viacom and received by the Commission on the dates set forth in Appendix A.

5. Viacom filed its first FCC Form 393 filings for Anderson, California, CUID No. CA0092, on December 27, 1993, and for Shasta County, California, CUID No. CA0095, and Redding, California, CUID No. CA0096, on December 15, 1993. Viacom filed amended FCC Form 393 filings for each franchise area on June 27, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[11]

DISCUSSION

6. Viacom asserts that its monthly CPS tier prices are justified by its benchmark filings because its prices are lower than the maximum permitted charges as calculated in the filings. However, upon review we have determined that Viacom has not correctly calculated its maximum permitted prices, and it is therefore appropriate to make the following adjustment to Viacom's calculations in Form 393:

a. In its amended filings of June 27, 1994, Viacom states that it calculated the Inflation Adjustment Factor (Form 393, Part II, Worksheet 1, Line 127, and Form 393, Part II, Worksheet 4, Line 401) using data it relied on when it set its CPS prices. If Viacom had done so correctly (i.e., if it had completed Form 393 with accurate data, including the most recent inflation data available as of the time it set its prices), and if based on this data Form 393 indicated that its prices were reasonable, then Viacom would have successfully justified its prices under paragraph 94 of the *Third Order on Reconsideration*.[12] However, the fig-

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Viacom has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Viacom implemented its CPS prices under the new regulations. See para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526 (released May 23, 1994).

[12] *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, FCC 94-40, 9 FCC Rcd 4316 (1994) (*"Third Order on Reconsideration"*).

ures Viacom used are not consistent with data on which it should have relied in setting its CPS prices. Specifically, Viacom used data released by the U.S. Department of Commerce on August 31, 1993, to complete Lines 122 and 125, but used earlier data to calculate the Inflation Factor on Line 123. Furthermore, Viacom claimed an Adjustment Time Period extending through November 1993 (Line 124), which is inconsistent with an attempt to justify rates based on August 1993 data. Viacom's calculation of the Inflation Adjustment Factor is thus incorrect.

b. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date as of which Viacom filed.[13] On its amended Forms 393, Viacom entered 14 months on Line 124, indicating that these filings were as of the end of November 1993. On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index (GNP-PI) figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through November 1993, the base date Viacom used in justifying its rates, of 1.032.

7. Because of this error, we conclude that Viacom has failed to demonstrate that its prices for the CPS tier were not unreasonable. We will therefore set prices for this tier, incorporating the adjustment discussed above. This adjustment has the effect of reducing the maximum permitted monthly CPS tier price for each franchise area to the levels set forth in Appendix B.

CONCLUSIONS

8. Upon review of the record herein, we conclude that Viacom's showing supports the maximum reasonable CPS tier price for each franchise area set forth in Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth on Appendix A) to May 14, 1994.[14] We further determine that we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

9. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Viacom Cable in Anderson, California, CUID No. CA0092; Shasta County, California, CUID No. CA0095; and Redding, California, CUID No. CA0096, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

10. IT IS FURTHER ORDERED, that the benchmark filings submitted by Viacom Cable with respect to Anderson, California, CUID No. CA0092; Shasta County, California, CUID No. CA0095; and Redding, California, CUID No. CA0096, for the period beginning with the filing of the first valid complaint in each franchise area and ending on May 14, 1994, as set forth on Appendix A, justify the maximum price in each franchise area set forth in Appendix B (plus franchise fee) for Viacom Cable's cable programming service tier.

11. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Viacom Cable shall refund to subscribers that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[15] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

12. IT IS FURTHER ORDERED, that Viacom Cable shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 30 days of Commission approval thereof.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
0092	11/29/93	11/23/93
0095	11/22/93	11/15/93
0096	11/18/93	11/15/93

Appendix B

CUID No.	Actual Rates	Maximum Reasonable Rates
0092	$11.84	$11.63
0095	$12.06	$11.86
0096	$12.06	$11.89

[13] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[14] This finding is based solely on the representations of Viacom listed in paragraph 5, *supra*, and the modification described in paragraph 6, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[15] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission.47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

APOLLO COMMUNICATIONS CORPORATION

Petition for Reconsideration
of Certification of
the County of Bartholomew, Indiana
to Regulate Basic Cable Service Rates
(FCC Community ID No. IN0702)

MEMORANDUM OPINION AND ORDER

Adopted: December 27, 1994; Released: December 28, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On December 9, 1993, Apollo Communications Corporation ("Apollo") filed a timely petition for reconsideration challenging the certification of the County of Bartholomew, Indiana (the "County") to regulate the system's rates for basic cable service and associated equipment.[1] The County filed an Opposition to the Petition for Reconsideration and a Motion for Additional Time to Respond, and Apollo filed its reply. On August 19, 1994, Apollo and the County each filed a supplement to their original pleadings pursuant to the Commission's July 29, 1994 Order.[2] Apollo filed an Opposition to the County's Supplemental Pleading on September 1, 1994. On September 20, 1994, the County filed an Opposition to Apollo's Supplemental Pleading. On October 14, 1994, Apollo filed a Further Supplemental Pleading. Finally, on December 21, 1994, Apollo filed an additional supplement correcting previously-filed information.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless they have actual knowledge to the contrary.[4] Certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days of the date such certification becomes effective.[6] Rate regulation is automatically stayed pending review of a timely filed petition for reconsideration alleging the presence of effective competition.[7]

II. DISCUSSION

3. Apollo argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the households in unincorporated Bartholomew County, its franchise area.[8] Apollo claims that it serves only 624 total basic subscribers of the 9,922 occupied housing units[9] in unincorporated Bartholomew County, or 6.29 percent of the total number of households. As supporting documentation, Apollo offers a copy of 1990 Census data.[10] which shows that there are 9,922 households in unincorporated Bartholomew County. Apollo also submits a declaration under penalty of perjury by a responsible official certifying to the accuracy of the subscriber data included in the petition.

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[1] Bartholomew County filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" ("FCC Form 328") on October 12, 1993. The certification became effective on November 11, 1993.

[2] *Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*).

[3] Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[4] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question subject to effective competition. 47 C.F.R. § 76.910(b). *See also* Communications Act of 1934 § 623(a)(4); 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[7] 47 C.F.R. § 76.911(c).

[8] The 1992 Cable Act (Communications Act of 1934 § 623(a)(2), 47 U.S.C. § 543(a)(2)) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases by which a cable system will be deemed subject to effective competition is if the system in question serves fewer than 30 percent of the households in the franchise area. Communications Act of 1934 § 623(l)(1)(A), 47 U.S.C. § 543(1)(1)(A); 47 C.F.R. § 76.905(b)(1).

[9] *See Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). As the Commission stated in the *Third Recon. Order*, "[a]s used in the Cable Act, we presume that Congress did not intend 'households' to have a different meaning than in the 1990 Census that would include vacant units or even partial year vacant units." *Third Recon. Order, supra*. The count of "households" in the 1990 Census reflects occupied housing units. Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

[10] As the Commission has stated recently, the 1990 Census data is an appropriate source for household data. *Effective Competition Order, supra*.

4. In its opposition, the County argues that Apollo miscalculates its penetration level in violation of the Commission's rules. According to the County, for purposes of determining a cable operator's penetration level, the number of homes actually served must be compared to the number of homes the operator chooses to pass, not the number of homes the operator is authorized by franchise to pass.[11] The County argues that, for purposes of determining its penetration level, Apollo looks to the total number of "homes" in the unincorporated areas of the County. However, the County asserts, Apollo does not contend that it passes or has made service available to all homes in the unincorporated areas of the County. The County argues that Apollo has systematically limited the area in which it offers service to a very small portion of the County. The County claims that it has made a preliminary review of the areas in which Apollo offers service, and determined that Apollo has affirmatively limited its service area to a very small portion of the County.[12] The County adds that Apollo has held a franchise since 1987 and does not appear to be planning significant expansion of its service area. As supporting documentation, the County submits a map of the County, which the County claims illustrates the portion of the County to which Apollo offers service. The County also provides an affidavit from a responsible official attesting to the copy of the map and the claims in the opposition.[13]

5. In reply, Apollo denies redefining its franchise area. It states that, although it serves only a small portion of the County, it is committed to further expansion within the franchise area and is merely waiting for the resolution of the potential financial burdens of rate regulation before going forward with its expansion plans. Apollo also argues that, should the Commission find that Apollo has redefined its franchise area, the Commission should also find that Apollo meets the competing provider test for effective competition set forth in the 1992 Cable Act and our rules.[14] Apollo offers numerous statistics in furtherance of this claim.[15]

6. As a preliminary matter, we are unpersuaded that the relevant franchise area for purposes of determining the presence of effective competition in this case is some area other than the entire unincorporated area of Bartholomew County. Specifically, the County has not provided any evidence that Apollo has made an affirmative decision to restrict its service. The County merely argues that Apollo, for purposes of determining its penetration level, looks to the total number of "homes" in the unincorporated areas of the County. However, the County asserts, Apollo does not contend that it passes or has made service available to all homes in the unincorporated areas of the County. The County argues that Apollo has limited the area in which it offers service to a very small portion of the County. The County adds that Apollo has held a franchise since 1987 and does not appear to be planning significant expansion of its service area.[16] Such an argument, by itself, is insufficient to support a claim that a cable operator has made an affirmative decision to redefine its franchise area. As the Commission has stated previously, "[t]he fact that a franchise area has not as yet been filled out by construction of

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[11] The County refers to our *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, 9 FCC Rcd 1164 (August 27, 1993) *First Recon. Order")*. However, the County does not state the test correctly. The Commission stated that "a franchise area is the area a system operator is granted authority to serve in its franchise." *Id.* at 1180. Thus, the substitution of a "homes passed" for "homes in the franchise area" test does not appear to be consistent with the plain language of the statute.

[12] In its *First Order on Reconsideration*, the Commission clarified the definition of "franchise area" for purposes of determining effective competition. *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, 9 FCC Rcd 1164 (1993) (*"First Recon. Order")*. Generally, "[a] franchise area is the area a system operator is granted authority to serve in its franchise." *Id.* at 1180. The Commission stated, however, that a more restricted definition of "franchise area" may be appropriate under limited circumstances, such as when an operator "has itself, through its own conduct, self-defined the areas to be served to such an extent that this redefined area accurately portrays the operator's "franchise area." *Id.* at 1181. Under this standard, the franchising authority has the burden of showing that the operator has made an "affirmative decision . . . to restrict service." *Id.*

[13] Affidavit of Ronald H. Taylor, Chairman, Bartholomew/Columbus Telecommunications Commission, dated March 31, 1994.

[14] One of the bases on which a cable system is deemed subject to effective competition is if the franchise area is: 1) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable programming to at least 50 percent of the households in the franchise area; and 2) the number of households subscribing to multichannel video programming other than the households in the franchise area. Communications Act of 1934 § 623(1)(1)(B), 47 U.S.C. § 543(l)(1)(B); 47 C.F.R. § 76.905(b)(2).

[15] Apollo argues that it faces effective competition from Sammons of Indiana, in a purported redefined franchise area which has a total of 1,017 "households." Apollo argues that its cable system serves 642 of the 1,017 households or approximately 63 percent of the households in its purportedly redefined franchise area. Thus, Apollo argues that it offers comparable programming to more than 50 percent of the households in its purportedly redefined franchise area. As supporting documentation, Apollo points to a declaration under penalty of perjury of a county official who conducted a survey of Apollo's cable service in the alleged redefined franchise area. With respect to Sammons, Apollo states that Sammons' system is technically available to 1,030 households, actually available to 1,020 households, and has 304 subscribers in the purported redefined franchise area. Thus, Apollo asserts that Sammons offers service to more than 50 percent of the households in the purported franchise area, with approximately 30 percent of the households in the purported franchise area subscribing to Sammons' services. As supporting documentation, Apollo offers a certification from the Vice President of Sammons Communications of Indiana, Inc. attesting to the number of "households" passed and served by Sammons. Finally, Apollo argues that both it and Sammons offer comparable programming of at least 12 channels of programming, including one non-broadcast channel. As support, Apollo submits copies of channels line-ups for Sammons and Apollo which indicate that Sammons offers at least 40 channels of programming, including at least 25 non-broadcast channels, while Apollo offers 35 channels of programming, including at least 20 channels of non-broadcast programming.

[16] Neither Apollo or the County address the fact that the franchise agreement between the parties requires Apollo to expand into unserved areas of the County when the population density reaches a level of 50 households per cable mile. However, no argument is made that Apollo has not fully complied with the franchise agreement.

a system would not by itself be taken as redefining the service area."[17] Because we do not find that Apollo has made an affirmative decision to limit its service area, we will not address its argument that it meets the competing provider effective competition test in its alleged redefined franchise area.

7. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[18] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, exists in the franchise area.[19] Apollo has met its burden. Apollo appropriately relied on data reflecting the number of households as required by our rules.[20] Relying on this data, Apollo has submitted evidence demonstrating that its cable system serving Bartholomew County, its franchise area, serves 624 of the 9,922 occupied housing units households, or 6.29 percent of the households in its franchise area. Thus, we find that Apollo's system serving the County is subject to effective competition. Accordingly, Apollo's petition is granted.

III. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Apollo Communications Corporation challenging the certification of Bartholomew County, IN to regulate Apollo Communications Corporation's rates IS GRANTED.

9. IT IS FURTHER ORDERED that the certification of Bartholomew County to regulate Apollo Communications Corporation's basic cable service rates IS RESCINDED.

10. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[17] *First Recon. Order, supra.*
[18] 47 C.F.R. § 76.906
[19] 47 C.F.R. § 76.911(b)
[20] *Third Recon. Order, supra.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition for Relief of TV-24 SARASOTA, INC. CSR-4186-L

Vs.

PARAGON COMMUNICATIONS
D/B/A PARAGON CABLE

For Leased Access Channels

MEMORANDUM OPINION AND ORDER

Adopted: December 23, 1994; Released: December 27, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On January 10, 1994, TV-24 Sarasota, Inc. ("TV-24") filed a Petition for Relief pursuant to Section 76.975 of the Commission's rules against Paragon Communications d/b/a Paragon Cable ("Paragon") alleging violations of the Federal Communications Commission's commercial leased access rules. On January 28, 1994, Paragon filed a Reply to TV-24's petition, asserting that it has fully complied with its obligations under our commercial leased access rules. In response to a Commission request, Paragon submitted supplemental information on August 22, 1994.[1] TV-24 filed a response to Paragon's supplemental filing on September 26, 1994.

II. BACKGROUND

2. In 1984, Congress amended the Communications Act of 1934 to add, among other things, a requirement that cable operators with 36 or more activated channels set aside part of their channel capacity for use by programmers that are not affiliated with them.[2] This requirement is called the commercial leased access or "leased access" requirement. The Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") revisited the leased access requirement and directed the Commission to establish, among other things, rules for determining maximum reasonable rates for leased access.[3] Pursuant to that Congressional directive, the Commission established rules applicable to leased access channel rates in its May 3, 1993 order for *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation,* MM Docket 92-266, (the *Rate Order),* 8 FCC Rcd 5631 (1993), at ¶ ¶ 531-538. *See also,* 47 C.F.R. § 76.970.

3. In the *Rate Order,* the Commission developed procedures for cable operators to follow in determining the maximum reasonable rate that a cable operator may charge any nonaffiliated programmer for leased access.[4] Under the Commission's rules, maximum reasonable rates are to be developed by cable operators for three categories of programs.[5] The three program categories are: (1) pay-per-event or pay-per-channel programs; (2) programming where more than fifty percent of the capacity is used to sell products to subscribers; and (3) all other programs. The highest implicit net fee that a cable operator charges any nonaffiliated programmer within each category is to be calculated, using procedures described in our rules, on a monthly basis. The highest implicit net fee thus determined for each of the three program categories becomes the maximum monthly rate that the operator may charge a programmer for leased access for that program category.[6]

4. The Commission determined that certain issues associated with obtaining leased access should be left for negotiations between the parties. For example, in establishing the maximum reasonable rates for leased access, the Commission noted that lower rates could be negotiated.[7] With respect to channel placement and tier access, the Commission also stated that this should be left in the first instance to negotiation between the parties.[8] The Commission further noted its belief that cable operators should accommodate all leases, i.e., leasing an hour on a regular leased channel, leasing a whole channel, or leasing for use as a subscription service.[9] The Commission's rules provide some guidance for establishing rates for these shorter lease periods, stating that maximum rates can be calculated by prorating the monthly maximum rate.[10]

5. Pursuant to the 1992 Cable Act, the Commission in the *Rate Order* developed an administrative dispute resolution process for the purpose of expediting resolution of disputes concerning leased access requirements. Under this streamlined procedure, any person aggrieved by the failure or refusal of a cable operator to make leased access capacity available or to charge rates for such capacity as mandated by the 1992 Cable Act and Commission's rules may file a petition for relief with the Commission.[11]

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[1] Paragon's supplemental information was submitted pursuant to a letter dated August 5, 1994, from the Commission's staff requesting certain information beyond that provided with the pleadings in order to assist in making a determination of compliance with our leased access rules.

[2] Communications Act of 1934, as amended, § 612(b)(1), 47 U.S.C. § 532(b)(1)(1992). The amount of channel capacity an operator must set aside is based on a system's activated channel capacity.

[3] Communications Act of 1934, § 612(c)(4)(A) & (B), 47 U.S.C. § 532(c)(4)(A) & (B) (1992).

[4] 47 C.F.R § 76.970(b)(c) and (d).

[5] 47 C.F.R. § 76.970(f).

[6] 47 C.F.R. § 76.970(d).

[7] *Rate Order,* ¶ 519.

[8] *Rate Order,* ¶ 498.

[9] *Rate Order,* ¶ 498, n.1277.

[10] 47 C.F.R. § 76.970(d).

[11] 47 C.F.R. § 76.975(b).

III. THE PLEADINGS

6. On January 10, 1994, TV-24 filed a Petition for Relief pursuant to Section 76.975 of the Commission rules alleging that Paragon was in violation of the Commission's leased access rules, by failing to establish a reasonable rate for part time use of a leased access channel. TV-24 is an operator of a low power television station in the Sarasota/Manatee, Florida area. It has requested that Paragon provide TV-24 with a part time leased access channel under the category 'All Other Programming' as defined in the Commission's rules.[12] It asserts that Paragon has quoted a rate of $100.60 per hour for the time period that it requested.[13] TV-24 asserts that this rate is well outside the guide lines established under Section 76.970 of the Commission's rules.[14]

7. In its Reply, Paragon, the cable system operator serving the described area, asserts that it has fully complied with its leased access obligations under Federal law and that it is prepared to make leased access channel capacity available to TV-24 at rates set pursuant to the Commission's leased access rules. In support of its position, Paragon submitted calculations from which it derived a maximum monthly rate of $29,518.70 for a full time channel. Paragon also submitted the following schedule of rates for programmers seeking to lease less than full time channel capacity.

Time of Day	1 to 4 Weeks	5 to 51 Weeks	52 Weeks
6AM - Noon	$44.28	$36.90	$29.52
Noon - 5PM	$54.12	$45.10	$36.08
5PM - 7PM	$61.50	$51.25	$41.00
7PM - 11PM	$78.72	$65.60	$52.48
11PM - 6AM	$29.52	$24.60	$19.68

According to Paragon, these rates permit it to recover its maximum permitted monthly rate if all time during the month is leased. Paragon states that the schedule reflects higher charges for certain hours, because those hours are generally recognized to be more valuable for exhibition of programming than others, and discounts for those who lease certain other periods of time.[15]

8. Noting that the information in Paragon's response did not provide a sufficient basis for assessing the reasonableness of these variable time-of-day rates, the Commission Staff requested further information from Paragon detailing the manner in which these rates were developed and the circumstances under which these rates may exceed Paragon's maximum permitted rate. Paragon's response to this request offers several arguments in support of its rate schedule, including the view that the value of a channel is not the same for each hour of the day, that the practical viewer base varies widely by time of day, that advertisers on broadcast and cable services pay varying rates based in part on time of day, and that it relied on its knowledge of viewership patterns and consulted A. C. Neilson's "Viewers in Profile" books.[16]

9. Paragon further argues that the alternative of simply prorating the maximum permitted rate to a flat hourly rate and charging the same rate for all hours of the day would be inconsistent with provision of the 1984 and 1992 Cable Acts, because it underprices peak viewing periods while overpricing off-peak periods. Under a pro rata scheme, Paragon states that operators unable to charge higher rates for peak periods will be reluctant to offer lower rates for off-peak hours, which would undermine the goals of diversity, competition and cable system growth that Congress intended to foster by mandating leased access. Paragon asserts that the legislative history of the 1984 Cable Act shows a Congressional intent that cable systems not have merely a single rate for all cable programmers, because a single rate "skewers competition among programmers in favor of those able to purchase prime-time slots," and may result in off-peak hours that are over priced and cannot be sold, resulting in a net loss for the system.[17] Paragon further posits that a single hourly rate may possibly cause unaffiliated programmers to migrate from existing arrangements to leased access channels, stating that this concern was in part the reason the Commission did not adopt a "benchmark" approach for regulating leased access rates.[18]

IV. DISCUSSION

10. The issues presented concerns the rates that Paragon may charge for hourly, or part-time use of access channels, and whether prime-time rates are appropriate rates to charge leased access programmers. The issues presented in this case are significant issues now before the Commission on reconsideration.[19] In this order, we resolve the issues presented in accordance with the current rules applicable to leased access channels.

11. The statutory provisions relating to leased access do not specifically address the question of rates for part-time use. Prorating the maximum monthly rate is one method by which rates for shorter periods can be derived. This method is stated in our rules as a method which can be used for establishing maximum rates for shorter periods.[20] However, the only rate that cable operators are not permitted to exceed under our rules is the maximum reasonable rate as calculated on a monthly basis from the highest implicit net fee.[21] We do not construe these rules as requiring an operator to adhere to a rigid formula for determining its hourly leased access rate by prorating its maximum rate for a full-time channel into equal hourly amounts.

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[12] *See* n.5, above.

[13] Paragon states that $35.00 of this quoted rate represents a charge for technical equipment, leaving a $65.60 hourly charge for the 7PM - 9PM time slot requested by TV-24. (*See* Paragon Reply, p. 2).

[14] TV-24 Petition, p. 1.

[15] *See* Paragon Reply, attached sworn statement of David Hall, February 8, 1994.

[16] *See* Supplemental Information filed by Paragon, August 22, 1994.

[17] *Id.*

[18] *Id.*

[19] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket 92-266 (petitions for reconsideration pending).

[20] *See* Section 76.970(d).

[21] *See* Section 76.970(c).

12. We agree with Paragon that the media industry places different values on the different hours of the day in recognition of the different values that different hours of the day have in the market place. We believe that cable operators should be allowed to charge different time-of-day rates so long as the differences have a reasonable basis. This approach will better recognize the different values different time slots have in the marketplace in which both cable operators and cable programmers, as well as other media users such as advertisers, operate. This approach will also further the statutory goal of promoting diverse programming, because programmers that could not afford rates based on uniform pro rata pricing will be better able to afford the resulting lower "non prime-time" rates. Additionally, allowing "prime-time" pricing should help promote fuller utilization of designated leased access channels by making "non prime-time" slots more attractive.

13. Permitting cable operators to charge reasonable "prime-time" hourly rates allows them to obtain the highest market value of channel capacity of the system, as our rules anticipate under the methodology for calculating the maximum monthly rate for a full channel.[22] However, in order to assure that the maximum monthly rate is not exceeded, we will require that Paragon establish a schedule of rates, or rate card, for different times of day pursuant to which, if all times were used, the sum of the part time charges for any single leased access channel would not exceed its maximum monthly rate for a leased access channel calculated in accordance with Section 76.970 of our rules.[23] Such rate structure shall be reasonably reflective of empirical time of day values and should not serve merely as a mechanism to retard use. We will also require Paragon to maintain on file adequate records, consistent with Section 76.970(e) of our rules, that show the total monthly revenues derived from part time users of each leased access channel, together with the maximum monthly charge for a full leased access channel and the documentation and calculations used for deriving the maximum monthly charge in accordance with Section 76.970 of the rules. We reserve the right to review Paragon's part time rates to assure that they both encourage use and provide adequate and reasonable compensation within the "implicit fee" structure.

14. As noted earlier, cable operators and cable programmers remain free to negotiate hourly leased access rates that generate charges lower than that derived from application of our rules.[24] In this context, we have confidence that cable programmers, such TV-24, well recognize the different values that are placed on different day parts in the media markets in which they operate by the entire media industry. These different values provide incentives for cable programmers to negotiate for favorable time slots appropriate to the value of the programming services they offer. Accordingly, until we gain more experience under our current rules for leased access rates, we see no need for imposing an overly rigid formula for part time rates such as a straight prorating of the maximum monthly full channel rate that TV-24 seeks.

IV. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED that Paragon Communications d/b/a Paragon Cable (herein "Paragon") shall, to the extent its current leased access rate schedule is not in compliance with our rulings herein, within twenty days from the effective date of this order, establish a reasonable schedule of rates, or rate card for different times of day pursuant to which, if all times were used, the sum of the part time charges for any single leased access channel would not exceed its maximum monthly rate for a leased access channel calculated in accordance with Section 76.970 of our rules.

16. IT IS FURTHER ORDERED that Paragon shall maintain on file adequate records, consistent with Section 76.970(e) of our rules which show the total monthly revenues derived from part time users of each leased access channel, together with the maximum monthly charge for a full leased access channel and the documentation and calculations used for deriving the maximum monthly charge in accordance with Section 76.970 of the rules.

17. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[22] In establishing regulations applicable to the development of leased access rates, the Commission adopted a methodology for calculating rates for leased access channels which takes into account the value placed on those channels by the cable operator. This methodology uses computed rates based on subscriber rates for basic, cable programming and premium services tiers and on rates paid by the cable operator for programming on those tiers of services. This methodology establishes the highest maximum rates for each of the three separate categories of cable programming defined in the rules. The Commission concluded that rates determined in this manner would be fair because they ". . . are derived from the highest market value of channel capacity of the system, " (*i.e.*, capacity utilized by unaffiliated programmers carried on the cable system). The Commission observed that despite a possible monopsony relationship between the cable operator and programmer paying the maximum contract rate, such rates would be reflective of maximum value for system channel capacity. (*See Rate Order*, ¶ *519*).

[23] *See* 47 C.F.R. § 76.970(d). Paragon has provided such a rate schedule in its Reply.

[24] *Rate Order*, at ¶ 519.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Nashoba Cable Services, LOI-93-23
Danvers, MA

Letter of Inquiry

MEMORANDUM OPINION AND ORDER

Adopted: December 18, 1994; Released: December 22, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. In a letter received by the Commission dated September 14, 1993, counsel for the Town of Danvers, MA alleged violations by Nashoba Cable Services of Danvers ("Nashoba") of Commission regulations governing the provision of cable television service.[1] In response to this complaint, the Commission issued Letter of Inquiry 93-23 ("LOI") to Nashoba on December 13, 1993.[2] The LOI asked Nashoba to provide information concerning, among other things, its compliance with the Commission's rules governing evasion in the offering of packages which allegedly are not rate-regulated.[3] Nashoba responded to our LOI by letter dated January 12, 1994.

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Congress created a regulatory scheme giving the Commission and local franchising authorities jurisdiction over the cable programming and equipment rates of non-competitive cable systems. The 1992 Cable Act provides that the rates of cable systems not subject to effective competition may be regulated by local franchising authorities, in the case of basic service, and by the Commission, in the case of cable programming service.[4] A stated policy of the 1992 Cable Act is to ensure that "consumer interests are protected in the receipt of cable service."[5]

3. The 1992 Cable Act requires cable operators to offer subscribers a basic tier that must contain at least all qualified local broadcast signals and, unless otherwise specified by the local franchising authority, public, educational, and governmental channels.[6] The Commission was charged by the 1992 Cable Act with creating regulations that ensure that the rates for the basic service tier are reasonable.[7] The 1992 Cable Act directs that "[s]uch regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[8] Under the 1992 Cable Act, operators may offer other channels in a cable programming service tier or tiers.[9] The 1992 Cable Act orders the Commission to create regulations for the cable programming service tiers that allow it to identify individual cases of unreasonable rates.[10] The 1992 Cable Act thus protects consumers' interests in continuing to receive the basic service tier and cable programming service tiers at reasonable rates.

4. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[11] The 1992 Cable Act's legislative history states that the Commission should scrutinize offerings of non-traditional stand-alone services to

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[1] The Commission also received a copy of a letter from the Town of Danvers, MA to Nashoba Cable Services dated September 13, 1993, alleging violations by Nashoba of Commission regulations governing the provision of cable television service.

[2] Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Alan S. Davis, General Partner, Nashoba Cable Services, Danvers, MA, LOI 93-23 (December 13, 1993). Copies of the Letter of Inquiry and Response are available to the public in the FCC's Cable Reference Center, 2033 M Street, N.W., Room 333, Washington, D.C. We also note that there is a pending rate complaint proceeding involving Nashoba. Our decisions made herein will be made a part of that proceeding.

[3] The LOI also requested information concerning negative option billing and Nashoba's compliance with regulations governing the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Order*, 8 FCC Rcd 2921 (1993) (*"Rate Freeze Order"), clarified*, 8 FCC Rcd 2917, 58 FR 21929 (April 26, 1993); *extended*, FCC 93-304 (released June 15, 1993), 58 FR 33560 (June 18, 1993), *Erratum*, 8 FCC Rcd 4511 (1993); *extended*, FCC 93-494 (released November 10, 1993), 58 FR 60141 (November 15, 1993); *extended*, 9 FCC Rcd 1299, 59 FR 6901 (February 14, 1994). This Order addresses only the regulatory status of Nashoba's a la carte package. Other issues in the LOI will be dealt with subsequently.

[4] Communications Act of 1934, as amended, § 623 (a)(2), 47 U.S.C. § 543 (a)(2) (1992).

[5] Pub. L. No. 102-385 § 2 (b) (4), 106 Stat. 1460 (1992); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 34 (1992).

[6] Communications Act of 1934 § 623 (b)(7)(A)(ii-iii), 47 U.S.C. § 543 (b)(7)(A)(ii-iii) (1992); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 at ¶ ¶ 157h)161 (1993) (*"Rate Order"*) (franchising authorities may require operators to carry PEG channels on tiers other than basic).

[7] Communications Act of 1934 § 623 (b)(1), 47 U.S.C. § 543 (b)(1) (1992).

[8] *Id.*

[9] Communications Act of 1934 § 623(l)(2), 47 U.S.C. § 543(l)(2) (1992).

[10] Communications Act of 1934 § 623 (c)(1)(A), 47 U.S.C. § 543 (c)(1)(A) (1992). Identification of individual cases of unreasonable rates is achieved by a process in which the Commission assumes jurisdiction over systems where a complaint about a cable programming service tier rate is filed.

[11] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).

"prevent repricing, retiering, or other alterations of rate structures" that could have the effect of evading the purposes of rate regulation.[12] This provision in the 1992 Cable Act is intended to give the Commission the authority to address changes in the cable industry's business practices that would thwart the intent of rate regulation.[13]

5. In the *Rate Order* the Commission defined evasion as "any practice or action which avoids the rate regulation provisions of the Cable Act or Commission rules contrary to the intent of the Act or its underlying policies."[14] We must scrutinize a particular operator's marketing or pricing practices to determine whether those practices have the effect of avoiding the requirements of our rate regulations, contrary to the intent of the 1992 Cable Act and our rules.

III. FACTS

6. Before September 1, 1993, Nashoba's services included a 22 channel basic tier, called Economy Basic, for $7.00 per month, a 21 channel cable programming service tier, called Super Basic, for $15.95 per month, a five channel cable programming service tier, called People's Choice, for $4.95 per month, and a six channel cable programming service tier, called People's Choice Plus, for $12.95 per month. The People's Choice tier consisted of The Disney Channel, SportsChannel, Bravo, Court TV, and E!. The People's Choice Plus tier consisted of the channels offered on the People's Choice tier and New England Sports Network (NESN). NESN was also offered individually for $9.95 per month.[15]

7. The following chart summarizes Nashoba's service tier offerings prior to September 1, 1993:

Offering	Channels	Price
1. Economy Basic	22	$ 7.00
2. Super Basic	21	$15.95
3. People's Choice or	5 or	$ 4.95 or
People's Choice Plus	6	$12.95
Total	48 or	$27.90 or
	49	$35.90

8. On September 1, 1993, the date our rate regulations became effective, Nashoba restructured its service offerings. Nashoba's restructured services included a 30 channel basic tier, called Economy Basic, for $15.73 per month, and a 21 channel cable programming service tier, called Super Basic, for $10.92 per month. In addition, Nashoba offered all of the channels previously offered on the People's Choice and People's Choice Plus tiers individually and continued to offered them in the same People's Choice and People's Choice Plus packages that were offered prior to its restructuring. The Disney Channel and SportsChannel were offered individually for $3.45; Bravo, E! and Court TV were offered individually for $1.00; and NESN was offered individually for $9.95. People's Choice was available for $4.95 and People's Choice Plus was available for $12.95.[16]

9. The following chart summarizes Nashoba's service tier options as of the date of its response to our LOI:[17]

Offering	Channels	Price
1. Economy Basic	30	$15.73
2. Super Basic	21	$10.92
3. People's Choice or	5 or	$ 4.95 or
People's Choice Plus	6	$12.95
Total	56 or	$31.60 or
	57	$39.60

10. At the time of Nashoba's response, 1,882 customers received the People's Choice package and 1,052 received the People's Choice Plus package, while there were 449 subscriptions to the individual channels in the packages. The most heavily subscribed individual channel as of the time of Nashoba's response was NESN, which was purchased individually by 398 customers.

IV. DISCUSSION

11. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[18] An evasion, as defined by the Commission, is an act or practice that "avoids the rate regulation provisions of the [Cable] Act or our rules contrary to the intent of the Act or its underlying policies."[19] In the *Rate Order*, we stated that "retiering otherwise permitted under our rules will not be deemed an evasion."[20] First, we examine whether Nashoba's response to the LOI shows that its restructuring of its offerings had the effect of evading rate regulation for the channels that Congress intended to be rate-regulated.

12. Nashoba's restructuring effective September 1, 1993, involved its elimination of its five/six channel People's Choice and People's Choice Plus tiers (the People's Choice Plus tier was comprised of the same five channels as the People's Choice tier, plus one additional channel) and the creation of its five/six-channel packages that it alleges are not rate-regulated. Thus, Nashoba eliminated an otherwise rate-regulated tier to create a new package of channels. In so doing, Nashoba avoided application of our rate regulations which generally required cable operators to reduce

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[12] H.R. Rep. No. 628 at 79.

[13] S. Rep. No. 92, 102d Cong., 2d Sess. at 77 (1992).

[14] *Rate Order* ¶ 451.

[15] Nashoba's service offerings prior to September 1, 1993 also included a three channel package of premium channels, called Front Row, for $11.95 per month. The channels offered in Front Row (Showtime, The Movie Channel, and Flix) could also be purchased individually for $9.95 per month (Showtime and The Movie Channel) and $5.95 per month (Flix). This package of a la carte channels, which was first made available in December 1992, is "grandfathered" under the Commission's regulations. *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994), n.263. (*"Second Reconsideration Order"*). *See also* 47 C.F.R. § 76.986(b)(1994). Although the Disney Channel and NESN also were offered individually prior to April 1, 1993, the other channels offered in the People's Choice tier were not offered individually at that time. Therefore, the People's Choice and People's Choice Plus packages do not qualify for the treatment accorded Front Row.

[16] In addition, Nashoba continued to offer its Front Row package for $11.95, and the individual channels in the package for $3.95 (Flix) and $9.95 (Showtime and The Movie Channel).

[17] This Order does not evaluate Nashoba's rates for its basic and cable programming service tiers. These rates are subject to review by the local franchising authority and the Commission in separate proceedings.

[18] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h).

[19] *Rate Order* ¶ 451.

[20] *Id.* at ¶ 453.

rates by about 10 percent. That is, if Nashoba had not restructured on September 1, 1993, it would have been required to recalculate its rates in accordance with the *Rate Order* we released on May 3, 1993, which generally required cable operators to reduce their rates. Moreover, customers who were receiving the five/six People's Choice and People's Choice Plus tier channels at issue apparently continued to receive them after the restructuring, and there appears to be no sufficient justification for Nashoba's restructuring other than to avoid rate regulation.

13. Other factors corroborate our view that Nashoba's restructuring may have had the effect of avoiding rate regulation. First, it offered this package on the eve of regulation. Second, it appears that Nashoba automatically subscribed its customers to the offerings that previously had been part of its People's Choice and People's Choice Plus tiers. In light of these facts, it appears that Nashoba's restructuring of its offerings may have evaded rate regulation. We will not find an actual evasion occurred, however, if Nashoba's action complied with our a la carte policy that was in effect at the time of its restructuring. If the offering met our requirements for a permissible collective offering of a la carte channels, then Nashoba would not have evaded our rate regulations because it would not be required to reduce its price for the collective a la carte package.[21]

14. In our *Rate Order*, the Commission recognized that "a la carte packages" appear to be "cable programming services," but said that "interpreting the statute in such a literal fashion could disadvantage consumers by denying them discounts on packages of per-channel or per-program services and by limiting subscriber access to a greater quantity of premium programming."[22] Thus, we envisioned that cable operators, for the most part, would offer channels that previously had been offered a la carte in discounted packages, and concluded that it would be better for consumers if we construed the 1992 Cable Act to permit such discounting.[23] This is not the type of offering that Nashoba and others have provided their subscribers. Specifically, these operators did not offer a discounted package of channels that previously had been offered a la carte to subscribers, but instead removed channels from a tier that would be subject to our rate regulations.

15. Moreover, in the *Rate Order*, the Commission determined that such a la carte packages would be exempt from rate regulation, i.e., would be deemed not to fall within the definition of "cable programming service," if two conditions were met: (1) the price for the combined package must not exceed the sum of the individual charges for each component service; and (2) the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the package. The Commission said that the second condition would be satisfied only when "the per channel offering provides consumers with a realistic service choice."[24]

16. Under the two-part test that we set forth in the *Rate Order*, it is clear, first, that the price for the combined package does not exceed the sum of the individual charges for the six services, because the sum of the per channel prices is $9.00 per month ($19.85 per month if NESN is taken) in contrast to the package prices of $4.95 per month for People's Choice and $12.95 per month for People's Choice Plus. The second part of the test is whether the separate parts of the package constitute a "realistic service offering." Our review of Nashoba's submission reveals that there were 449 subscriptions to individual "a la carte" channels, while 1,882 customers received the People's Choice package and 1,052 customers received the People's Choice Plus package.[25] Our test does not specify what number would indicate that an offering is "a realistic service offering." However, the fact that such a low number of subscribers opted for individual channels rather than the package, together with the other factors present in this case,[26] tends to show, in this instance, that the per-channel offering does not constitute a realistic service offering.

17. Even if we were to apply the 15 interpretive guidelines set forth in our *Second Reconsideration Order*,[27] we still would not reach a clear answer to the question of what constitutes a realistic service offering. Although some factors support a finding that Nashoba's offering was not a permissible a la carte package, other factors point the other way. In particular, although a "significant percentage" of the channels offered in the a la carte package (100 percent) was removed from regulated tiers, the absolute number (six) was small.[28] Moreover, our test does not explain how the factors are to be weighed against each other. In these

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[21] In our *Going Forward Order*, we have reconsidered our regulatory treatment of collective offerings of a la carte channels. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (adopted November 10, 1994) *("Going Forward Order")*. Specifically, we have determined that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at ¶46. However, in order to determine whether Nashoba evaded rate regulation when it restructured its offering, we must evaluate its a la carte package under the rules that were in effect when it restructured.

[22] *Rate Order* ¶ 329.

[23] *See, e.g., Rate Order* ¶ 453 n.1161 ("There is no evidence that operators would or, as a business matter, could shift programming previously offered as part of a tier to 'a la carte' status, *i.e.*, a per-channel or per-program offering, to avoid the rate regulation applicable to tiers").

[24] *Id.* at ¶ ¶ 327-29 & n.808. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994) *("Second Reconsideration Order")*, the Commission affirmed its prior view. It said that "we continue to believe that the public interest will be served by generally permitting non-regulated treatment of collective offerings of 'a la carte' channels if the offering enhances consumer choice and does not constitute an evasion of rate regulation." *Id.* at ¶ 194. In this regard, we retained the two-part test contained in the *Rate Order* for determining when we would refrain from regulating "a la carte packages." In addition, the Commission set out 15 guidelines to enable operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings." *Id.* at ¶ 195.

[25] Moreover, a significant number of the individual subscriptions, 398 of 449, were to one channel, NESN.

[26] *See, e.g.*, ¶ ¶ 13-14, *supra*.

[27] *Second Reconsideration Order* at ¶ 196.

[28] *Id.*

circumstances, we cannot say that it was clear to Nashoba that its restructuring was not a permissible a la carte package.

18. In our recently adopted *Going Forward Order*, we have reconsidered our rules relating to a la carte packages and concluded that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act. For that reason, the package at issue is subject to rate regulation and cannot continue to be treated as an unregulated package of channels. In reaching this conclusion in the *Going Forward Order*, we acknowledged that, as applied to many fact patterns, we did not provide a clear test in the *Rate Order* and the *Second Reconsideration Order* for determining whether an a la carte package was permissible. In adopting the 15 interpretive guidelines in the *Second Reconsideration Order* to supplement the *Rate Order's* two-prong test, we hoped to enable operators to better determine what collective offerings of a la carte channels would be considered a realistic service offering, and, hence, not an evasion of rate regulation.[29] Our experience to date, however, indicates that our efforts did not produce the intended result and that, instead, there has been confusion as to whether collective offerings of a la carte channels constituted an evasion of rate regulation. Indeed, we cannot say that it is clear that Nashoba's restructuring was not a permissible a la carte package.

19. For that reason, we do not think that it would be equitable to subject Nashoba to refund liability. This result is distinguishable from the result we reached in *Adelphia Cable Partners, L.P.*,[30] in which we determined that we will require refunds if Adelphia's rate justification proceedings show that subscribers' rates were higher than our rules permitted. In that case, the cable operator announced that it would offer all the channels previously offered on its only cable programming service tier on an individual basis or as a collective offering of a la carte channels. In so doing, Adelphia removed its only cable programming service tier from rate regulation, a 32 channel tier, while here, Nashoba attempted to treat only six channels as an unregulated collective offering of a la carte channels. In addition, Nashoba retained a significant cable programming service tier of 21 channels.

20. We will not require Nashoba to restructure its tiers so as to return the channels offered in the a la carte package to the basic or cable programming service tiers.[31] Instead, on a prospective basis, we will consider Nashoba's collective offering of a la carte channels a new product tier[32] even though it would not qualify as a new product tier under our recently announced *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a cable programming service tier. In light of the prior confusion over what constituted a permissible a la carte offering we see no good reason to subject Nashoba or its Danvers customers to the confusion and transaction costs that would result if we required Nashoba to retier.

V. ORDERING CLAUSES

21. Accordingly, IT IS ORDERED that Nashoba's package as it existed on December 13, 1993, may be treated as a new product tier under our *Going Forward Order*.

22. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[29] *See Going Forward Order* at ¶ 40.

[30] *Adelphia Cable Partners, L.P.*, South Dade County, Florida, LOI-93-42, DA 94-1277 (released November 18, 1994).

[31] We are not precluding Nashoba from treating this package as a cable programming service tier, priced pursuant to our rules, or from putting the channels back into an existing tier.

[32] *See Going Forward Order* at ¶ ¶ 16-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Falcon Cable TV LOI-93-50
Port Orchard, Washington

Letter of Inquiry

MEMORANDUM OPINION AND ORDER

Adopted: December 18, 1994; Released: December 22, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. The Commission received a Form 329 Complaint on November 1, 1993, concerning the reasonableness of the rates charged for cable programming services by Falcon Cable TV of Port Orchard, Washington ("Falcon"). In response to this complaint, the Commission issued Letter of Inquiry 93-50 ("LOI") to Falcon on December 13, 1993.[1] The LOI asked Falcon to provide information concerning its compliance with the Commission's rules governing evasion in the offering of packages which allegedly are not rate-regulated. Falcon responded to our LOI on January 12, 1994.

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Congress created a regulatory scheme giving the Commission and local franchising authorities jurisdiction over the cable programming and equipment rates of non-competitive cable systems. The 1992 Cable Act provides that the rates of cable systems not subject to effective competition may be regulated by local franchising authorities, in the case of basic service, and by the Commission, in the case of cable programming services.[2] A stated policy of the 1992 Cable Act is to ensure that "consumer interests are protected in the receipt of cable service."[3]

3. The 1992 Cable Act requires cable operators to offer subscribers a basic tier that must contain at least all qualified local broadcast signals and, unless otherwise specified by the local franchising authority, public, educational, and governmental channels.[4] The Commission was charged by the 1992 Cable Act with creating regulations that ensure that the rates for the basic service tier are reasonable.[5] The 1992 Cable Act directs that "[s]uch regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[6] Under the 1992 Cable Act, operators may offer other channels in a cable programming service tier or tiers.[7] The 1992 Cable Act orders the Commission to create regulations for the cable programming service tiers that allow it to identify individual cases of unreasonable rates.[8] The 1992 Cable Act thus protects consumers' interests in continuing to receive the basic service tier and cable programming service tiers at reasonable rates.

4. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[9] The 1992 Cable Act's legislative history states that the Commission should scrutinize offerings of non-traditional stand-alone services to "prevent repricing, retiering, or other alterations of rate structures" that could have the effect of evading the purposes of rate regulation.[10] This provision in the 1992 Cable Act is intended to give the Commission the authority to address changes in the cable industry's business practices that would thwart the intent of rate regulation.[11]

5. In the *Rate Order* the Commission defined evasion as "any practice or action which avoids the rate regulation provisions of the Cable Act or Commission rules contrary to the intent of the Act or its underlying policies."[12] We must scrutinize a particular operator's marketing or pricing practices to determine whether those practices have the effect of avoiding the requirements of our rate regulations, contrary to the intent of the 1992 Cable Act and our rules.

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[1] Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Falcon Cable TV, Port Orchard, WA, LOI-93-50 (December 13, 1993). Copies of the Letter of Inquiry and Response are available to the public in the FCC's Cable Reference Center, 2033 M Street, N.W., Room 333, Washington, D.C. We also note that there is a pending rate complaint proceeding involving Falcon. Our decisions made herein will be made a part of that proceeding. Thus, for example, we will not order Falcon to make refunds to subscribers in regard to Falcon's purported "a la carte" restructuring. Obviously, however, we may order refunds if we find violations of other rules that should result in refunds.

[2] Communications Act of 1934, as amended, § 623 (a)(2), 47 U.S.C. § 543 (a)(2) (1992).

[3] Pub. L. No. 102-385 § 2 (b) (4), 106 Stat. 1460, (1992); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 34 (1992).

[4] Communications Act of 1934 § 623 (b)(7)(A)(ii-iii), 47 U.S.C. § 543 (b)(7)(A)(ii-iii); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 at ¶ ¶ 157-161 (1993) (*"Rate Order"*) (franchising authorities may require operators to carry PEG channels on tiers other than basic).

[5] Communications Act of 1934 § 623 (b)(1), 47 U.S.C. § 543 (b)(1).

[6] *Id.*

[7] Communications Act of 1934 § 623(l)(2), 47 U.S.C. § 543(l)(2).

[8] Communications Act of 1934 § 623 (c)(1)(A), 47 U.S.C. § 543 (c)(1)(A). Identification of individual cases of unreasonable rates is achieved by a process in which the Commission assumes jurisdiction over systems where a complaint about a cable programming service tier rate is filed.

[9] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h).

[10] H.R. Rep. No. 628 at 79.

[11] S. Rep. No. 92, 102d Cong., 2d Sess. at 77 (1992).

[12] *Rate Order* ¶ 451.

III. FACTS

6. Before September 1, 1993, Falcon's services included an eight channel basic tier, called Basic Cable, for $10.95 per month, an eleven channel cable programming service tier, called Tier 1, for $9.00 per month, and an additional 16 channel cable programming service tier, called Tier 2, for $2.50 per month.

7. The following chart summarizes Falcon's service tier offerings prior to September 1, 1993:

Offering	Channels	Price
1. Basic Cable	27	$10.95
2. Tier 1	11	$ 9.00
3. Tier 2	16	$ 2.50
Total	54	$22.45

8. Beginning September 1, 1993, the day our rate regulations became effective, Falcon restructured its service offerings. Falcon's restructured service offerings included a 29 channel basic tier, called Basic Cable, for $19.12[13] per month and six channels offered on an individual basis and in an a la carte package called SATPAC. The six channels were The Discovery Channel, Turner Network Television (TNT), Prime Sports Northwest, The Family Channel, Cable News Network (CNN), and CNN-Headline News.[14] All six channels were originally in Falcon's Tier 2.

9. Falcon states that as of the date of its response, The Discovery Channel, TNT, Prime Sports Northwest, The Family Channel, CNN, and CNN-Headline News could be purchased individually for $2.00 per month.[15] Falcon further states that as of the date of its response, all six channels could be purchased as a package for $5.25 per month.[16]

10. The following chart summarizes Falcon's service tier options as of the date of its response to our LOI:[17]

Offering	Channels	Price
1. Basic Cable	29	$18.82
2. SATPAC	67	$ 5.25
Total	96	$24.07

11. Falcon argues, *inter alia,* that it began offering its services individually and through the SATPAC package in order to implement Congress' intent to maximize consumer choice. However, based on the record, very few consumers elected to exercise that choice. As of the date of its response, Falcon states that there were 27 subscriptions to individual SATPAC channels, while 23,518 of Falcon's 24,530 subscribers took the SATPAC package.[18]

IV. DISCUSSION

12. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[19] An evasion, as defined by the Commission, is an act or practice that "avoids the rate regulation provisions of the [Cable] Act or our rules contrary to the intent of the Act or its underlying policies."[20] In the *Rate Order,* we stated that "retiering otherwise permitted under our rules will not be deemed an evasion."[21] First, we examine whether Falcon's response to the LOI shows that its restructuring of its offerings had the effect of evading rate regulation for the channels that Congress intended to be rate-regulated.

13. Falcon's restructuring effective September 1, 1993, involved its movement of six channels (The Discovery Channel, TNT, Prime Sports Northwest, The Family Channel, CNN, and CNN-Headline News) from its 16 channel Tier 2 to create the six-channel package that it alleges is not rate-regulated. Thus, Falcon removed channels from an otherwise rate-regulated tier to create a new package of channels. In so doing, Falcon avoided application of our rate regulations which generally required cable operators to reduce rates by about 10 percent. That is, if Falcon had not restructured on August 31, 1993, it would have been required to recalculate its rates in accordance with the *Rate Order* we released on May 3, 1993, which generally required cable operators to reduce their rates. Moreover, customers that were receiving the six Tier 2 channels at issue apparently continued to receive them after the restructuring, and there appears to be no sufficient justification for Falcon's restructuring other than to avoid rate regulation.

14. Other factors corroborate our view that Falcon's restructuring may have had the effect of avoiding rate regulation. First, it offered this package on the eve of regulation. Second, it apparently automatically subscribed its customers to the offerings that previously had been part of its cable programming service tiers. In light of these facts, it appears that Falcon's restructuring of its offerings may have evaded rate regulation. We will not find an actual evasion occurred, however, if Falcon's action complied with our a la carte policy that was in effect at the time of its restructuring. If the offering met our requirements for a permissible collective offering of a la carte

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[13] Falcon states that the price for Basic Cable was reduced to $18.82 per month effective November 22, 1993.

[14] Falcon states that its initial notice to customers regarding its restructuring indicated that ESPN and USA Network also would be available individually and as part of the SATPAC package, but that due to contractual arrangements, Falcon was unable to provide these services individually. In an October 22, 1993 notice to subscribers, Falcon stated that ESPN and USA Network would be provided free to subscribers receiving SATPAC, and in a January 10, 1994 notice to subscribers, Falcon stated that ESPN and USA Network would be provided to all subscribers "on a free preview basis."

[15] Falcon states that as of March 1, 1994, these services would be available for $1.75 per month.

[16] Falcon states that the price of the SATPAC package was initially priced at $4.95. The price was increased to $5.25 as of November 22, 1993.

[17] This Order does not evaluate Falcon's rates for its basic service tier. These rates are subject to review by the local franchising authority in a separate proceeding.

[18] Falcon states that this data reflects subscribership as of December 22, 1993. Falcon updated its response on February 17, 1994. In its updated response, Falcon states that as of February 2, 1994, there were 60 subscriptions to individual channels, while 23,045 of Falcon's 24,147 subscribers took the SATPAC package.

[19] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h).

[20] *Rate Order* ¶ 451.

[21] *Id.* at ¶ 453.

channels, then Falcon would not have evaded our rate regulations because it would not be required to reduce its price for the collective a la carte package.[22]

15. In our *Rate Order*, the Commission recognized that "a la carte packages" appear to be "cable programming services," but said that "interpreting the statute in such a literal fashion could disadvantage consumers by denying them discounts on packages of per-channel or per-program services and by limiting subscriber access to a greater quantity of premium programming."[23] Thus, we envisioned that cable operators, for the most part, would offer channels that previously had been offered a la carte in discounted packages, and concluded that it would be better for consumers if we construed the 1992 Cable Act to permit such discounting.[24] This is not the type of offering that Falcon and others have provided their subscribers. Specifically, these operators did not offer a discounted package of channels that previously had been offered a la carte to subscribers, but instead removed channels from a tier that would be subject to our rate regulations.

16. Moreover, in the *Rate Order*, the Commission determined that such a la carte packages would be exempt from rate regulation, i.e., would be deemed not to fall within the definition of "cable programming service," if two conditions were met: (1) the price for the combined package must not exceed the sum of the individual charges for each component service; and (2) the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the package. The Commission said that the second condition would be satisfied only when "the per channel offering provides consumers with a realistic service choice."[25]

17. Under the two-part test that we set forth in the *Rate Order*, it is clear, first, that the price for the combined package does not exceed the sum of the individual charges for the fourPservices, because subscribers may purchase the six channels for $2.00 each per month ($1.75 each per month effective March 1, 1994) or the six-channel package for $5.25. The second part of the test is whether the separate parts of the package constitute a "realistic service offering." The results of our review of Falcon's submission reveal that far less than one percent of Falcon's subscribers in Port Orchard chose to subscribe to individual SATPAC channels. Our test does not specify what percentage would indicate that an offering is "a realistic service offering." However, the fact that less than one percent of Falcon's subscribers chose to subscribe to individual SATPAC channels, together with the other factors present in this case,[26] tends to show, in this instance, that the per-channel offering does not constitute a realistic service offering.

18. Even if we were to apply the 15 interpretive guidelines set forth in our *Second Reconsideration Order*,[27] we still would not reach a clear answer to the question of what constitutes a realistic service offering. Although some factors support a finding that Falcon's offering was not a permissible a la carte package, other factors point the other way. In particular, although a "significant percentage" of the channels offered in the a la carte package (100 percent) was removed from regulated tiers, the absolute number (six) was small.[28] Moreover, our test does not explain how the factors are to be weighed against each other. In these circumstances, we cannot say that it was clear to Falcon that its restructuring was not a permissible a la carte package.

19. In our recently adopted *Going Forward Order*, we have reconsidered our rules relating to a la carte packages and concluded that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act. For that reason, the package at issue is subject to rate regulation and cannot continue to be treated as an unregulated package of channels. In reaching this conclusion in the *Going Forward Order*, we acknowledged that, as applied to many fact patterns, we did not provide a clear test in the *Rate Order* and the *Second Reconsideration Order* for determining whether an a la carte package was permissible. In adopting the 15 interpretive guidelines in the *Second Reconsideration Order* to supplement the *Rate Order's* two-prong test, we hoped to enable operators to better determine what collective offerings of a la carte channels would be considered a realistic service offering, and, hence, not!an evasion of rate regulation.[29] Our experience to date, however, indicates that our efforts did not produce the intended result and that, instead, there has been confusion as to whether collective offerings of a la carte channels constituted an evasion of rate regulation. Indeed, we cannot say that it is clear that Falcon's restructuring was not a permissible a la carte package.

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[22] In our *Going Forward Order*, we have reconsidered our regulatory treatment of collective offerings of a la carte channels. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (adopted November 10, 1994) *("Going Forward Order")*. Specifically, we have determined that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at ¶ 46. However, in order to determine whether Falcon evaded rate regulation when it restructured its offering, we must evaluate its a la carte package under the rules that were in effect when it restructured.

[23] *Rate Order* ¶ 329.

[24] *See, e.g., Rate Order* ¶ 453 n.1161 ("There is no evidence that operators would or, as a business matter, could shift programming previously offered as part of a tier to 'a la carte' status, *i.e.*, a per-channel or per-program offering, to avoid the rate regulation applicable to tiers").

[25] *Id.* at ¶ ¶ 327-28 & n.808. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994) *("Second Reconsideration Order")*, the Commission affirmed its prior view. It said that "we continue to believe that the public interest will be served by generally permitting non-regulated treatment of collective offerings of 'a la carte' channels if the offering enhances consumer choice and does not constitute an evasion of rate regulation." *Id.* at ¶ 194. In this regard, we retained the two-part test contained in the *Rate Order* for determining when we would refrain from regulating "a la carte packages." In addition, the Commission set out 15 guidelines to enable operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings." *Id.* at ¶ 195.

[26] *See, e.g.*, ¶ ¶ 13-14, *supra*.

[27] *Second Reconsideration Order* at ¶ 196.

[28] *Id.*

[29] *See Going Forward Order* at ¶ 40.

20. For that reason, we do not think that it would be equitable to subject Falcon to refund liability. This result is distinguishable from the result we reached in *Adelphia Cable Partners, L.P.*,[30] in which we determined that we will require refunds if Adelphia's rate justification proceedings show that subscribers' rates were higher than our rules permitted. In that case, the cable operator announced that it would offer all the channels previously offered on a cable programming service tier on an individual basis or as a collective offering of a la carte channels. In so doing, Adelphia removed an entire service tier from rate regulation, while here, Falcon eliminated a cable programming service tier but moved most of the channels from that tier into the rate regulated basic tier. Falcon attempted to treat only six channels as an unregulated collective offering of a la carte channels. Moreover, while we have indicated above that our rules for determining whether collective offerings of a la carte channels constitute an evasion were in many instances difficult to apply, we do not believe that our a la carte rules are unclear as applied to the fact pattern in the *Adelphia* case. In the *Rate Order*, we stated that a cable operator could not escape rate regulation simply by calling what otherwise would be a rate regulated tier an a la carte package.[31] We reiterated this admonition in the *Second Reconsideration Order* when we warned against eliminating "an entire regulated tier" and "turning it into an a la carte package."[32]

21. We will not require Falcon to restructure its tiers so as to return the channels offered in the a la carte package to the cable programming service tier.[33] Instead, on a prospective basis, we will consider Falcon's collective offering of a la carte channels a new product tier[34] even though it would not qualify as a new product tier under our recently announced *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a cable programming service tier. In light of the prior confusion over what constituted a permissible a la carte offering, and because Falcon's six-channel tier, unlike Adelphia's offering, did not constitute a clear evasion of our rate rules, we see no good reason to subject Falcon or its Port Orchard customers to the confusion and transaction costs that would result if we required Falcon to retier.

V. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED that Falcon's package as it existed on December 13, 1993, may be treated as a new product tier under our *Going Forward Order*.

23. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[30] *Adelphia Cable Partners, L.P.*, South Dade County, Florida, LOI-93-42, DA 94-1277 (released November 18, 1994).

[31] *Rate Order*, 8 FCC Rcd 5837, n.808 ("we do not think a cable operator can escape rate regulation simply by announcing that tiered services are available a la carte").

[32] *Second Reconsideration Order* ¶ 196.

[33] We are not precluding Falcon from treating this package as a cable programming service tier, priced pursuant to our (rules, or from putting the channels back into an existing tier.

[34] *See Going Forward Order* ¶ ¶ 16-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Falcon Cable TV LOI-94-2
Southern Shores, North Carolina

Letter of Inquiry

MEMORANDUM OPINION AND ORDER

Adopted: December 18, 1994; Released: December 22, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. In a letter received by the Commission dated September 13, 1993, The Honorable H. Martin Lancaster, United States House of Representatives, alleged violations by Falcon Cable TV of Southern Shores, North Carolina ("Falcon") of Commission regulations governing the provision of cable television service.[1] In response to this complaint, the Commission issued Letter of Inquiry 94-2 ("LOI") to Falcon on February 22 1994.[2] The LOI asked Falcon to provide information concerning, among other issues, rate and service changes made in anticipation of, and/or in response to, rate regulation, including the offering of packages which allegedly are not regulated.[3] Falcon responded to our LOI by letter dated March 24, 1994.

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Congress created a regulatory scheme giving the Commission and local franchising authorities jurisdiction over the cable programming and equipment rates of non-competitive cable systems. The 1992 Cable Act provides that the rates of cable systems not subject to effective competition may be regulated by local franchising authorities, in the case of basic service, and by the Commission, in the case of cable programming service.[4] A stated policy of the 1992 Cable Act is to ensure that "consumer interests are protected in the receipt of cable service."[5]

3. The 1992 Cable Act requires cable operators to offer subscribers a basic tier that must contain at least all qualified local broadcast signals and, unless otherwise specified by the local franchising authority, public, educational, and governmental channels.[6] The Commission was charged by the 1992 Cable Act with creating regulations that ensure that the rates for the basic service tier are reasonable.[7] The 1992 Cable Act directs that "[s]uch regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[8] Under the 1992 Cable Act, operators may offer other channels in a cable programming service tier or tiers.[9] The 1992 Cable Act orders the Commission to create regulations for the cable programming service tiers that allow it to identify individual cases of unreasonable rates.[10] The 1992 Cable Act thus protects consumers' interests in continuing to receive the basic service tier and cable programming service tiers at reasonable rates.

4. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[11] The 1992 Cable Act's legislative history states that the Commission should scrutinize offerings of non-traditional stand-alone services to "prevent repricing, retiering, or other alterations of rate

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[1] Representative Lancaster's letter attached a copy of a letter from a Falcon subscriber dated September 8, 1993, alleging violations by Falcon of Commission regulations governing the provision of cable television service.

[2] Letter from Alexandra M. Wilson, Acting Chief, Mass Media Bureau, FCC, to Falcon Cable TV, Kill Devil Hill, NC LOI-94-2 (February 22, 1994). Copies of the Letter of Inquiry and Response are available to the public in the FCC's Cable Reference Center, 2033 M Street, N.W., Room 333, Washington, D.C. We also note that there is a pending rate complaint proceeding involving Falcon. Our decisions made herein will be made a part of that proceeding.

[3] The LOI also requested information concerning negative option billing and Falcon's compliance with regulations governing the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Order*, 8 FCC Rcd 2921 (1993) (*"Rate Freeze Order"*), *clarified*, 8 FCC Rcd 2917, 58 FR 21929 (April 26, 1993); *extended*, FCC 93-304 (released June 15, 1993), 58 FR 33560 (June 18, 1993), *Erratum*, 8 FCC Rcd 4511 (1993); *extended*, FCC 93-494 (released November 10, 1993), 58 FR 60141 (November 15, 1993); *extended*, 9 FCC Rcd 1299, 59 FR 6901 (February 14, 1994). This Order addresses only the regulatory status of Falcon's a la carte package. Other issues in the LOI will be dealt with subsequently.

[4] Communications Act of 1934, as amended, § 623 (a)(2), 47 U.S.C. § 543 (a)(2).

[5] Pub. L. No. 102-385 § 2 (b) (4), 106 Stat. 1460 (1992); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 34 (1992).

[6] Communications Act of 1934 § 623 (b)(7)(A)(ii-iii), 47 U.S.C. § 543 (b)(7)(A)(ii-iii); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 at ¶ ¶ 157-161 (1993) (*"Rate Order"*) (franchising authorities may require (operators to carry PEG channels on tiers other than basic).

[7] Communications Act of 1934 § 623 (b)(1), 47 U.S.C. § 543 (b)(1).

[8] *Id.*

[9] Communications Act of 1934 § 623(l)(2), 47 U.S.C. § 543(l)(2).

[10] Communications Act of 1934 § 623 (c)(1)(A), 47 U.S.C. § 543 (c)(1)(A). Identification of individual cases of unreasonable rates is achieved by a process in which the Commission assumes jurisdiction over systems where a complaint about a cable programming service tier rate is filed.

[11] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h).

structures" that could have the effect of evading the purposes of rate regulation.[12] This provision in the 1992 Cable Act is intended to give the Commission the authority to address changes in the cable industry's business practices that would thwart the intent of rate regulation.[13]

5. In the *Rate Order* the Commission defined evasion as "any practice or action which avoids the rate regulation provisions of the Cable Act or Commission rules contrary to the intent of the Act or its underlying policies."[14] We must scrutinize particular operator's marketing or pricing practices to determine whether those practices have the effect of avoiding the requirements of our rate regulations, contrary to the intent of the 1992 Cable Act and our rules.

III. FACTS

6. Before September 1, 1993, Falcon's services included a ten channel basic tier, called Basic Service, for $18.00 per month, a seven channel cable programming service tier, called Tier 1, for $2.00, and an additional 18 channel cable programming service tier, called Tier 2, for $2.41.

7. The following chart summarizes Falcon's service tier offerings prior to September 1, 1993:

Offering	Channels	Price
1. Basic Service	10	$18.00
2. Tier 1	7	$ 2.00
3. Tier 2	18	$ 2.41
Total	35	$22.41

8. On September 1, 1993, the date our rate regulations became effective, Falcon restructured its service offerings. Falcon's restructured services included a 29 channel basic tier, called Basic Service, for $16.54 per month, and seven channels offered on an individual basis and in an a la carte package. The seven channels were WTBS, WWOR, The Family Channel, Turner Network (TNT), The Weather Channel, The Nashville Network (TNN), and American Movie Classics (AMC).[15] On November 15, 1993, Falcon made ESPN available individually and as part of its a la carte package and on January 15, 1994, Falcon made Home Team Sports and The Sci-Fi Channel available individually and as part of its a la carte package. WWOR, WTBS, and The Weather Channel were originally in Falcon's Tier 1 and TNN, The Family Channel, TNT, and AMC were originally in Falcon's Tier 2. Home Team Sports and The Sci-Fi Channel were part of Falcon's Basic Service after September 1, 1993.[16]

9. Falcon states that as of the date of its response, WTBS, WWOR, The Family Channel, TNT, The Weather Channel, TNN, AMC, ESPN, Home Team Sports and The Sci-Fi Channel were offered individually for $1.25 per month.[17] Falcon further states that as of the date of its response, all ten channels could be purchased for $5.25 per month.

10. The following chart summarizes Falcon's service tier options as of the date of its response to our LOI:[18]

Offering	Channels	Price
1. Basic Service	29	$16.54
2. A la carte package	10[19]	$ 5.25
Total	39	$21.79

11. Falcon argues, *inter alia,* that it began offering its services individually and through the a la carte package in order to implement Congress' intent to maximize consumer choice. However, based on the record, very few consumers elected to exercise that choice. As of the date of its response, Falcon states that there were no subscriptions to the individual channels in the a la carte package, while all of Falcon's 1,263 subscribers purchased the package.

IV. DISCUSSION

12. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[20] An evasion, as defined by the Commission, is an act or practice that "avoids the rate regulation provisions of the [Cable] Act or our rules contrary to the intent of the Act or its underlying policies."[21] In the *Rate Order,* we stated that "retiering otherwise permitted under our rules will not be deemed an evasion."[22] First, we examine whether Falcon's response to the LOI shows that its restructuring of its offerings had the effect of evading rate regulation for the channels that Congress intended to be rate-regulated.

13. Falcon fundamentally changed its service to subscribers by eliminating two entire cable programming service tiers and offering eight of the channels that comprised those cable programming service tiers (together with two new channels) in a package that it alleges is not rate-regulated. In so doing, Falcon avoided application of our rate regulations which generally required cable operators to reduce rates by about 10 percent (and denied its customers who received the package the benefit of the reduced price to which rate regulation entitled them). That is, if Falcon had not restructured its service offerings on its new system on September 1, 1993, it would have been required to recalculate its rates in accordance with the *Rate Order* we released on May 3, 1993, which generally required cable operators to reduce their rates.

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12 H.R. Rep. No. 628 at 79.

13 S. Rep. No. 92, 102d Cong., 2d Sess. at 77 (1992).

14 *Rate Order* ¶ 451.

15 Falcon states that its initial notice to customers regarding its restructuring indicated that Nickelodeon also would be available individually and as part of the a la carte package, but that due to contractual arrangements, Falcon was unable to provide that channel individually. Commencing with its November 15, 1993 billing statement, Falcon notified its customers that Nickelodeon would be provided as part of the a la carte package "at no additional cost." Falcon states that in billing statements sent out beginning in February 1994, Falcon notified its subscribers that Nickelodeon would be added to Basic Service with no increase in the cost for that service.

16 Prior to September 1, 1993, Home Team Sports was part of Tier 2. The Sci-Fi Channel was not offered prior to September 1, 1993.

17 Falcon states that as of March 10, 1994, these services would be available for $1.25 each per month.

18 This Order does not evaluate Falcon's rates for its basic service tiers. These rates are subject to review by the local franchising authority in a separate proceeding.

19 Nine of the channels were removed from rate-regulated tiers. *See* ¶ 9 and n.16, *supra.*

20 Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).

21 *Rate Order* ¶ 451.

22 *Id.* at ¶ 453.

14. We believe that Falcon has not provided a sufficient justification for this change to overcome our finding that there is an evasion of rate regulation. To the contrary, Falcon states that all of its subscribers who received both Tier 1 and Tier 2 were given the identical package of channels after Falcon's September 1, 1993 restructuring.[23] Other than an attempt to evade rate regulation, there appears to be no sufficient justification for this restructuring.

15. Other factors corroborate our finding that Falcon's restructuring had the effect of evading rate regulation. First, Falcon restructured its offerings on the eve of regulation. Second, it automatically subscribed its customers to the offerings that previously had been part of its Tier 1 and Tier 2. In light of these facts, we find that Falcon's restructuring of its offerings constituted an evasion of our rate regulations rules.

16. Because Falcon's restructuring is a purported collective offering of a la carte channels, we also must determine whether the offering met the Commission's requirements for a permissible collective offering of a la carte channels. If the offering met the Commission's requirements for a permissible offering of a la carte channels, then Falcon would not have evaded our rate regulations because it would not have been required to reduce its price for the collective a la carte package.[24]

17. In our *Rate Order*, the Commission recognized that "a la carte packages" appear to be "cable programming services," but said that "interpreting the statute in such a literal fashion could disadvantage consumers by denying them discounts on packages of per-channel or per-program services and by limiting subscriber access to a greater quantity of premium programming."[25] Thus, we envisioned that cable operators, for the most part, would offer channels that previously had been offered a la carte in discounted packages, and concluded that it would be better for consumers if we construed the 1992 Cable Act to permit such discounting.[26] This is not the type of offering that Falcon and others have provided their subscribers. Specifically, these operators did not offer a discounted package of channels that previously had been offered a la carte to subscribers, but instead removed channels from tiers that would be subject to our rate regulations.

18. Moreover, in the *Rate Order*, the Commission determined that such a la carte packages would be exempt from rate regulation, i.e., would be deemed not to fall within the definition of "cable programming service," if two conditions were met: (1) the price for the combined package must not exceed the sum of the individual charges for each component service; and (2) the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the package. The Commission said that the second condition would be satisfied only when "the per channel offering provides consumers with a realistic service choice."[27]

19. Under the two-part test that we set forth in the *Rate Order*, it is clear, first, that the price for the combined package does not exceed the sum of the individual charges for the channels that comprise the a la carte package, because the sum of the per channel prices is $20.00 per month ($12.50 per month effective March 10, 1994) in contrast to the package price of $5.25 per month. The second part of the test is whether the separate parts of the package constitute a "realistic service offering." The results of our review of Falcon's submission reveal that there were no subscriptions to individual "a la carte" channels, while all of Falcon's 1,263 customers received the a la carte package. This fact, together with the other factors present in this case,[28] tends to show, in this instance, that the per-channel offerings do not constitute a realistic service offering.

20. Even if we were to apply the 15 interpretative guidelines set forth in our *Second Reconsideration Order*,[29] we still would conclude that Falcon's offerings do not constitute a realistic service offering. Falcon's submission reveals additional evidence weighing against a finding that its individual a la carte channels constitute a realistic service offering. A "significant percentage" of channels in the package was "removed from regulated tiers," which would "weigh against unregulated treatment."[30] In this case, 90 percent of the channels in the package were removed from regulated tiers.

21. In our recently adopted *Going Forward Order*, we have reconsidered our rules relating to a la carte packages and concluded that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the

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[23] We note, however, that Falcon added four new channels to its basic tier.

[24] In our *Going Forward Order*, we have reconsidered our regulatory treatment of collective offerings of a la carte channels. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (adopted November 10, 1994) *("Going Forward Order")*. Specifically, we have determined that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at ¶ 46. However, in order to determine whether Falcon evaded rate regulation when it restructured its offering, we must evaluate its a la carte package under the rules that were in effect when it restructured.

[25] *Rate Order* ¶ 329.

[26] *See, e.g., Rate Order* ¶ 453 n.1161 ("There is no evidence that operators would or, as a business matter, could shift programming previously offered as part of a tier to 'a la carte' status, *i.e.*, a per-channel or per-program offering, to avoid the rate regulation applicable to tiers").

[27] *Id.* at ¶ ¶ 327-28 & n.808. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Second Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994) (*"Second Reconsideration Order"*), the Commission affirmed its prior view. It said that "we continue to believe that the public interest will be served by generally permitting non-regulated treatment of collective offerings of a la carte channels if the offering enhances consumer choice and does not constitute an evasion of rate regulation." *Id.* at ¶ 194. In this regard, we retained the two-part test contained in the *Rate Order* for determining when we would refrain from regulating "a la carte packages." In addition, the Commission set out 15 guidelines to enable operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings." *Id.* at ¶ 195.

[28] *See, e.g.*, ¶ ¶ 13-15, *supra*.

[29] *Id.* at ¶ 196.

[30] *Id.*

1992 Cable Act. In reaching this conclusion in the *Going Forward Order*, we acknowledged that, as applied to many fact patterns, we did not provide a clear test in the *Rate Order* and the *Second Reconsideration Order* for determining whether an a la carte package was permissible.[31]

22. We do not believe, however, that our a la carte rules are unclear as applied to the fact pattern at issue in this case. In the *Rate Order* we stated that a cable operator could not escape rate regulation simply by calling what otherwise would be a rate-regulated tier an a la carte package.[32] We reiterated this admonition in the *Second Reconsideration Order* when we warned against eliminating "an entire regulated tier" and "turning it into an a la carte package."[33] This, however, is essentially what Falcon did by eliminating entirely its cable programming service tiers, creating a new service tier comprised of nine of the channels that previously had been offered in the cable service programming tiers and one new channel, and offering that new service tier as an allegedly unregulated package. While we have acknowledged that aspects of our evaluation of a la carte packages were unclear,[34] as applied to these particular facts, this prong of the test is clear and requires no additional guidance or explanation from the Commission. In light of the fact that it is clear that turning a rate-regulated tier into an a la carte package is an evasion of rate regulation, and because that essentially is what Falcon did in Southern Shores, we find that Falcon's retiering in fact clearly constitutes just such an evasion.[35]

23. We find that Falcon's a la carte package, as the offering existed in the Town of Southern Shores, North Carolina and surrounding communities on February 22, 1994, the date of our LOI, must be treated as a rate-regulated cable programming service tier. As a result, effective 90 days from the release date of this Order, Falcon either must offer the channels in this package as part of the respective rate-regulated tiers from which they came or offer the channels collectively as separate rate-regulated tiers of cable programming service.[36] We further conclude that these packages are rate-regulated offerings as of September 1, 1993, and that the channels composing them must be counted as rate-regulated channels for purposes of rate justification as of that date.

V. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED that Falcon's a la carte package is subject to rate regulation as of September 1, 1993, and the channels composing them must be counted by Falcon as rate-regulated channels for purposes of rate justification, as of that date.

25. IT IS FURTHER ORDERED that, effective 90 days from the release date of this Order, Falcon either must offer these channels as part of the respective rate-regulated tiers from which they came or offer the channels collectively as separate rate-regulated tiers of cable programming services.

26. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[31] In adopting the 15 interpretive guidelines in the *Second Reconsideration Order* to supplement the *Rate Order's* two-prong test, we hoped to enable operators to better determine what collective offerings of a la carte channels would be considered an evasion of rate regulation. *See Going Forward Order* at ¶ 40.

[32] *Rate Order*, 8 FCC Rcd 5837, n.808 ("we do not think a cable operator can escape rate regulation simply by announcing that tiered services are available a la carte").

[33] *Second Reconsideration Order* ¶ 196.

[34] *See Warner Cable Communications*, Milwaukee, Wisconsin, LOI-93-14, DA 94-1276 (released November 18, 1994).

[35] *See Adelphia Cable Partners, L.P.*, South Dade County, Florida, LOI-93-42, DA 94-1277 (released November 18, 1994).

[36] To provide 90 days gives Falcon ample time to comply with the 30 day notice provisions of our regulations for rate and programming changes. *See* 47 C.F.R. ¶ ¶ 76.309(c)(3)(i)(B), 76.932 and 76.964. Falcon, of course, may continue to offer any channels as single channel offerings consistent with the 1992 Cable Act and our rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Century Southwest Cable TV LOI-93-17
Beverly Hills and Los Angeles,
California.

Letter of Inquiry

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1994; Released: December 22, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. The Commission received letters from the City of Los Angeles dated November 3, 1993, and the City of Beverly Hills dated September 16, 1993, alleging that Century Southwest Cable Television, Inc. ("Century") violated Commission regulations governing cable television service. In response to this complaint, the Commission issued Letter of Inquiry 93-17 ("LOI") to Century dated December 13, 1993.[1] The LOI asked Century to provide information concerning, among other issues, its compliance with the Commission's rules governing evasion in the offering of packages which allegedly are not rate-regulated.[2] Century responded to our LOI on January 28, 1994.

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Congress created a regulatory scheme giving the Commission and local franchising authorities jurisdiction over the cable programming and equipment rates of non-competitive cable systems. The 1992 Cable Act provides that the rates of cable systems not subject to effective competition may be regulated by local franchising authorities, in the case of basic service, and by the Commission, in the case of cable programming services.[3] A stated policy of the 1992 Cable Act is to ensure that "consumer interests are protected in the receipt of cable service."[4]

3. The 1992 Cable Act requires cable operators to offer subscribers a basic tier that must contain at least all qualified local broadcast signals and, unless otherwise specified by the local franchising authority, public, educational, and governmental channels.[5] The Commission was charged by the 1992 Cable Act with creating regulations that ensure that the rates for the basic service tier are reasonable.[6] The 1992 Cable Act directs that "[s]uch regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[7] Under the 1992 Cable Act, operators may offer other channels in a cable programming service tier or tiers.[8] The 1992 Cable Act orders the Commission to create regulations for the cable programming service tiers that allow it to identify individual cases of unreasonable rates.[9] The 1992 Cable Act thus protects consumers' interests in continuing to receive the basic service tier and cable programming service tiers at reasonable rates.

4. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[10] The 1992 Cable Act's legislative history states that the Commission should scrutinize offerings of non-traditional stand-alone services to "prevent repricing, retiering, or other alterations of rate structures" that could have the effect of evading the pur-

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[1] Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Mr. Kyle Smith, Manager, Century Southwest Cable Television, Inc., LOI-93-17 (December 13, 1993). Copies of the Letter of Inquiry and Response are available to the public in the FCC's Cable Reference Center, 2033 M Street, N.W., Room 333, Washington, D.C. We also note that there is a pending rate complaint proceeding involving Century. Our decisions made herein will be made a part of that proceeding.

[2] The LOI also requested information concerning negative option billing and compliance with regulations governing the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Order*, 8 FCC Rcd 2921 (1993) (*"Rate Freeze Order"*), *clarified*, 8 FCC Rcd 2917, 58 FR 21929 (April 26, 1993); *extended*, FCC 93-304 (released June 15, 1993), 58 FR 33560 (June 18, 1993), *Erratum*, 8 FCC Rcd 4511 (1993); *extended*, FCC 93-494 (released November 10, 1993), 58 FR 60141 (November 15, 1993); *extended*, 9 FCC Rcd 1299, 59 FR 6901 (February 14, 1994). This Order addresses only the regulatory status of the packages. Other issues in the LOI will be dealt with subsequently.

[3] Communications Act of 1934 § 623 (a)(2), 47 U.S.C. § 543 (a)(2)(1992).

[4] Pub. L. No. 102-385 § 2 (b) (4) (1992); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 34 (1992).

[5] Communications Act of 1934 § 623 (b)(7)(A)(ii-iii), 47 U.S.C. § 543 (b)(7)(A)(ii-iii); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 ¶ ¶ 157-161 (1993) (*"Rate Order"*) (franchising authorities may require operators to carry PEG channels on tiers other than basic).

[6] Communications Act of 1934 § 623 (b)(1), 47 U.S.C. § 543 (b)(1).

[7] *Id.*

[8] Communications Act of 1934 § 623(l)(2), 47 U.S.C. § 543(l)(2).

[9] Communications Act of 1934 § 623 (c)(1)(A), 47 U.S.C. § 543 (c)(1)(A). Identification of individual cases of unreasonable rates is achieved by a process in which the Commission assumes jurisdiction over systems where a complaint about a cable programming service tier rate is filed.

[10] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h).

poses of rate regulation.[11] This provision in the 1992 Cable Act is intended to give the Commission the authority to address changes in the cable industry's business practices that would thwart the intent of rate regulation.[12]

5. In the *Rate Order* the Commission defined evasion as "any practice or action which avoids the rate regulation provisions of the Cable Act or Commission rules contrary to the intent of the Act or its underlying policies."[13] We must scrutinize a particular operator's marketing or pricing practices to determine whether those practices have the effect of avoiding the requirements of our rate regulations, contrary to the intent of the 1992 Cable Act and our rules.

III. FACTS

A. Beverly Hills

6. Century's response to our LOI states that prior to September 1, 1993, in Beverly Hills it offered a 26 channel basic tier, called Limited Basic, for $16.30 per month and a 29 channel cable programming service tier, called Satellite Tier, for $9.85 per month. Both tiers of service could be purchased together for $26.15 per month.

7. The following chart summarizes Century's service tier offerings in Beverly Hills prior to September 1, 1993:

Offering	Channels	Price
1. Limited Basic	26	$16.30
2. Satellite Tier	29	$ 9.85
Total	55	$26.15

8. As of September 1, 1993, Century restructured its service offerings in Beverly Hills to include a 42 channel basic tier for $24.08 per month and a 7 channel cable programming service tier for $4.01. It also began offering 12 channels (2 that were moved from the basic tier and 10 that were moved from the cable programming service tier) individually and through three packages called Century Select 12, Century Select 6A and Century Select 6B. Century Select 12 is a package of all 12 individually offered channels and Century Select 6A and 6B are 6 channel packages of different groupings of the 12 individually offered channels. Century argues, *inter alia*, that it began offering its services individually and through the Century Select package in order to implement Congress' intent to maximize consumer choice. However, based on this record, very few consumers elected to exercise such alleged choice.[14] At the time of its response to our LOI, Century states that the price for individual channels was $.79 each. The Century Select 12 package cost $6.30 per month and the Century select 6A and 6B packages cost $4.20 each. Century's basic tier, cable programming service tier and Century Select 12 package could be purchased for $34.39 per month.

9. The following chart summarizes Century's service tier options in Beverly Hills as of the date of its response to our LOI:[15]

Offering	Channels	Price
1. Basic Service	42	$24.08
2. Satellite Tier	7	$ 4.01
3. A la Carte Packages		
a. Century Select	12	$ 6.30
b. Century Select 6A	6	$ 4.20
c. Century Select 6B	6	$ 4.20
Total	61	$34.39

10. Century stated that at the time of its response 8,736 of its approximately 9,866 subscribers purchased the Century Select 12 package; only 8 subscribers purchased Century Select 6A and no subscribers purchased Century Select 6B. Three hundred ninety-one subscriptions to individual channels were made at that time. Based on these figures, assuming a best case scenario for Century, each subscription to an individual channel represents a consumer; less than 4 percent of Century's customers elected to subscribe to individual channels, indicating that essentially no one considered that they had a "realistic choice." This analyzes the facts most favorably to Century because fewer than 391 customers may have subscribed to individual channels.

B. Los Angeles

11. Century's response to our LOI for Los Angeles included information for three franchise areas: "Franchise Area F" (West Los Angeles); "Franchise Area G" (Sherman Oaks); and "Franchise Area H" (Eagle Rock). Offerings in these three areas are the same, except where noted. Century's response states that prior to September 1, 1993, in Los Angeles it offered a 21 channel basic tier, called Limited Basic, for $16.30 per month and a 15 channel cable programming service tier, called Expanded Basic, for $9.10 per month. (Eagle Rock's cable programming service tier contained only 14 channels.) Both tiers of service could be purchased together for $25.40 per month.

12. The following chart summarizes Century's service tier offerings in Los Angeles prior to September 1, 1993:

Offering	Channels	Price
1. Limited Basic	21	$16.30
2. Satellite Tier	15 (14)	$ 9.10
Total	36 (35)	$25.40

13. As of September 1, 1993, Century restructured its service offerings in Los Angeles to include a 31 channel basic tier for $23.25 per month. It eliminated its cable programming service tier. It also began offering 12 channels (2 that were moved from the basic tier and 10 that were moved from the cable programming service tier) individually and through three packages called Century Select 12, Century Select 6A and Century Select 6B. (In Eagle Rock, only 9 channels were moved from the cable programming service tier; the tenth channel was added to the Eagle Rock system at this time as part of its 12 channel

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[11] H.R. Rep. No. 628, 102d Cong., 2d Sess. at 79 (1992).
[12] S. Rep. No. 92, 102d Cong., 2d Sess. at 77 (1992).
[13] *Rate Order* ¶ 451.
[14] *See infra* ¶ ¶ 19 and 20.
[15] This Order does not evaluate Century's rates for its basic and cable programming service tiers in Beverly Hills. These rates are subject to review by the local franchising authority and the Commission in separate proceedings.

a la carte offerings.) Century Select 12 is a package of all 12 individually offered channels and Century Select 6A and 6B are 6 channel packages of different groupings of the 12 individually offered channels. Century argues, *inter alia*, that it began offering its services individually and through the Century Select package in order to implement Congress' intent to maximize consumer choice. However, based on this record, very few consumers elected to exercise such alleged choice.[16] At the time of its response to our LOI, Century states that the price for individual channels was $.79 each. The Century Select 12 package cost $6.30 per month and the Century Select 6A and 6B packages cost $4.20 each. Century's basic tier and the Century Select 12 package could be purchased for $29.55 per month.

14. The following chart summarizes Century's service tier options in Los Angeles as of the date of its response to our LOI:[17]

Offering	Channels	Price
1. Limited Basic	31	$23.25
2. A la Carte Packages		
a. Century Select 12	12	$ 6.30
b. Century Select 6A	6	$ 4.20
c. Century Select 6B	6	$ 4.20
Total	43	$29.55

15. Century stated that, at the time of its response, 35,914 of its approximately 37,641 Area F subscribers purchased the Century Select 12 package; only 1 subscriber purchased Century Select 6A and no subscribers purchased Century Select 6B. Two hundred twenty-seven subscriptions to individual channels were made at that time. Based on these figures, assuming a best case scenario for Century, each subscription to an individual channel represents a consumer; less than .6 percent of Century's Area F customers elected to subscribe to individual channels, indicating that essentially no one considered that they had a "realistic choice." This analyzes the facts most favorably to Century because fewer than 227 customers may have subscribed to individual channels. The same is true for the two other franchise areas in Los Angeles. In Area G, 36,080 of its approximately 37,198 subscribers purchased the Century Select 12 package; only 4 subscribers purchased Century Select 6A and one subscriber purchased Century Select 6B. One hundred eight subscriptions to individual channels were made. In Area H, 40,090 of its approximately 40,993 subscribers purchased the Century Select 12 package, no subscribers purchased the Century Select 6A package and nine subscribers purchased the Century Select 6B package. Forty-six subscriptions to individual channels were made at that time.

IV. DISCUSSION

16. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[18] An evasion, as defined by the Commission, is an act or practice that "avoids the rate regulation provisions of the [Cable] Act or our rules contrary to the intent of the Act or its underlying policies."[19] In the *Rate Order*, we stated that "retiering otherwise permitted under our rules will not be deemed an evasion."[20] First, we examine whether Century's response to the LOI shows that its restructuring of its offerings had the effect of evading rate regulation for the bulk of the channels that were in the cable programming service tier that Congress intended to be rate-regulated.

17. The tables of Century's service tier options as of the date of our LOI for both Beverly Hills and Los Angeles show a fundamental change in its service to subscribers by removing 12 channels from rate regulation and, in the case of Los Angeles, by eliminating the entire cable programming service tier. With regard to these 12 channels, Century avoided application of our rate regulations which generally required cable operators to reduce rates by about 10 percent (and denied the over 99 percent of its customers in Los Angeles and the 96 percent of its customers in Beverly Hills who received the package the benefit of the reduced price to which rate regulation entitled them). That is, if Century had not restructured on September 1, 1993, it would have been required to recalculate its rates for the 12 channels in accordance with the *Order* we released on May 3, 1993, which generally required cable operators to reduce their rates.

18. We believe that Century has not provided a sufficient justification for this change to overcome our finding that there is an evasion of rate regulation. To the contrary, virtually all of Century's subscribers were given the package of 12 channels that they received before September 1, 1993. (Few subscribers actually subscribed to individual channels instead of the Century Select 12 package.) Other than an attempt to evade rate regulation, there appears to be no sufficient justification for this restructuring.

19. Other factors corroborate our finding that Century's restructuring had the effect of evading rate regulation. First, Century discontinued its cable programming service tier entirely in Los Angeles and moved most of the channels comprising it to the new package on the eve of regulation. Similarly, in Beverly Hills, it reduced its rate-regulated cable programming service tier from 29 to 7 channels and created an allegedly non-rate-regulated 12 channel package before regulation commenced. Second, Century automatically subscribed its cable programming service tier customers to the 12 channel package offerings. In light of these facts, we find that Century's restructuring of its offerings constituted an evasion of our rate regulation rules.

20. Because Century's restructuring is a purported collective offering of a la carte channels, we also must determine whether the offering met the Commission's requirements for a permissible collective offering of a la carte channels. If the offering met the Commission's requirements for a permissible collective offering of a la carte channels, then Century would not have evaded our rate regulations because it would not have been required to reduce its price for the collective a la carte package.[21]

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[16] *See infra* ¶ ¶ 19 and 20.

[17] This Order does not evaluate Century's rate for its basic tier in Los Angeles. This rate is subject to review by the local franchising authority.

[18] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h).

[19] *Rate Order* ¶ 451.

[20] *Rate Order* ¶ 453.

[21] In our *Going Forward Order*, we have reconsidered our

21. In our *Rate Order,* the Commission recognized that "a la carte packages" appear to be "cable programming services," but said that "interpreting the statute in such a literal fashion could disadvantage consumers by denying them discounts on packages of per-channel or per-program services and by limiting subscriber access to a greater quantity of premium programming."[22] Thus, we envisioned that cable operators, for the most part, would offer channels that previously had been offered "a la carte" in discounted packages, and concluded that it would be better for consumers if we construed the 1992 Cable Act to permit such discounting.[23] This is not the type of offering that Century and others have provided their subscribers. Specifically, these operators did not offer a discounted package of channels that previously had been offered "a la carte" to subscribers, but instead removed channels from a tier that would be subject to our rate regulations.

22. Moreover, in the *Rate Order,* the Commission determined that "a la carte packages" would be exempt from rate regulation, i.e., would be deemed not to fall within the definition of "cable programming service," if two conditions were met: (1) the price for the combined package must not exceed the sum of the individual charges for each component service; and (2) the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the package. The Commission said that the second condition would be satisfied only when "the per channel offering provides consumers with a realistic service choice."[24]

23. Under the two-part test that we set forth in the *Rate Order,* it is clear, first, that the price for the combined package does not exceed the sum of the individual charges for the packaged services, because the price for the individual channels is $.79 and the 12 channel package price is $6.30. The second part of the test is whether the separate parts of the package constitute a "realistic service offering." The results of our review of Century's submission reveal that, in Beverly Hills, 96 percent of the subscribers did not choose to subscribe to individual "a la carte" channels and, in Los Angeles, more than 99 percent of the subscribers did not choose to subscribe to individual "a la carte" channels.[25] This fact, together with the other factors present in this case,[26] tends to show that in this instance the per-channel offering does not constitute a realistic service offering.

24. Even if we were to apply the 15 interpretive guidelines set forth in our *Second Reconsideration Order,* we still would conclude that Century's offering does not constitute a realistic service offering. Century's submission reveals additional evidence weighing against a finding that its individual a la carte channels constitute a realistic service choice. A "significant percentage" of channels in the package "were removed from regulated tiers," which would "weigh against unregulated treatment."[27] In this case, 100 percent of the channels in the package were removed from a regulated tier (in Eagle Rock, 91 percent of the channels were removed from a regulated tier).

25. In our recently adopted *Going Forward Order,* we have reconsidered our rules relating to a la carte packages and concluded that such packages are cable programming service tiers, within the meaning of Section 3(l)(2) of the 1992 Cable Act. In reaching this conclusion, we acknowledged that as applied to many fact patterns, we "did not provide a clear test for determining whether an a la carte package was permissible."[28]

26. We do not believe, however, that our a la carte rules are unclear as applied to the fact pattern at issue in this case. In the *Rate Order* we stated that a cable operator could not escape rate regulation simply by calling what otherwise would be a rate-regulated tier an a la carte package.[29] We reiterated this admonition in the *Second Reconsideration Order* when we warned against eliminating "an entire regulated tier" and "turning [it] into an a la carte package."[30] This, however, is essentially what Century did by moving 12 channels to an allegedly unregulated package in both Beverly Hills and Los Angeles, and additionally, in Los Angeles, by eliminating its entire cable programming service tier. While we have acknowledged that aspects of our evaluation of a la carte packages were unclear,[31] as applied to these particular facts, this prong of

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regulatory treatment of collective offerings of a la carte channels. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking,* MM Docket Nos. 92-266 and 93-215, FCC 94-286 (adopted November 10, 1994) *("Going Forward Order").* Specifically, we have determined that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act and therefore generally will be subject to our rate regulation rules. However, in order to determine whether Century evaded rate regulation when it restructured its offering, we must evaluate its a la carte package under the rules that were in effect when it restructured.

[22] *Rate Order* ¶ 329.

[23] *See, e.g., Rate Order* ¶ 453 n.1116 ("There is no evidence that operators would or, as a business matter, could shift programming previously offered as part of a tier to 'a la carte' status, *i.e.,* a per-channel or per-program offering, to avoid the rate regulation applicable to tiers").

[24] *Id.* at ¶ ¶ 327-28 & n.808. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Second Order on Reconsideration, and Fifth Notice of Proposed Rulemaking,* 9 FCC Rcd 4119 (1994) (*"Second Reconsideration Order"),* the Commission affirmed its prior view. It said that "we continue to believe that the public interest will be served by generally permitting non-regulated treatment of collective offerings of a la carte' channels if the offering enhances consumer choice and does not constitute an evasion of rate regulation." *Id.* at ¶ 194. In this regard, we retained the two-part test contained in the *Rate Order* for determining when we would refrain from regulating "a la carte packages." In addition, the Commission set out 15 interpretive guidelines to enable operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings." *Id.* at ¶ 195.

[25] *See* ¶ ¶ 10 and 15, *supra.*

[26] *See* ¶ ¶ 17-19, *supra.*

[27] *Second Reconsideration Order* ¶ 196.

[28] In adopting the 15 interpretive guidelines in the *Second Reconsideration Order* to supplement the *Rate Order's* two-prong test, we hoped to enable operators to better determine what collective offerings of a la carte channels would be considered an evasion of rate regulation. *See Going Forward Order* (adopted November 10, 1994).

[29] *Rate Order* ¶ 328 n.808.

[30] *Second Reconsideration Order* ¶ 196.

[31] *Warner Cable Communications,* Milwaukee, Wisconsin, LOI-93-14.

the test is clear and requires no additional guidance or explanation from the Commission. Turning a rate-regulated tier into an a la carte package is an evasion of rate regulation and that is exactly what Century did in Los Angeles. Likewise, taking as many as 12 channels from regulated tiers, as it did in Beverly Hills, is such an evasion. Therefore, we find that Century's retiering in Beverly Hills and Los Angeles clearly constitutes just such an evasion.

27. We find that Century's Century Select 12 package, as it existed in Beverly Hills and Los Angeles, California on December 13, 1993, the date of our LOI, must be treated as a rate-regulated cable programming service tier. As a result, effective 90 days from the release date of this Order, Century must either offer the channels in this package as part of the respective rate-regulated tiers from which they came or offer the channels collectively as a separate rate-regulated tier of cable programming service.[32] We further conclude that this package is a rate-regulated offering as of September 1, 1993, and that the channels composing it must be counted as rate-regulated channels for purposes of rate justification as of that date.

V. ORDERING CLAUSES

28. Accordingly, IT IS ORDERED that Century's Century Select package is subject to rate regulation as of September 1, 1993, and the channels composing it must be counted by Century as rate-regulated channels for purposes of rate justification, as of that date.

29. IT IS FURTHER ORDERED that, effective 90 days from the release date of this Order, Century must either offer these channels as part of the respective rate-regulated tiers from which they came or offer the channels collectively as a separate rate-regulated tier of cable programming service.

30. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[32] To provide 90 days gives Century ample time to comply with the 30 day notice provisions of our regulations for rate and programming changes. *See* 47 C.F.R. §§ 76.309(c)(3)(i)(B), 76.932 and 76.964. Century, of course, may continue to offer any channels as single channel offerings consistent with the 1992 Cable Act and our rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Binghamton NewChannels, Binghamton, NY — LOI-93-48

Letter of Inquiry

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1994; Released: December 22, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. The Commission received a Form 329 Complaint on October 8, 1993, concerning the reasonableness of the rates charged for cable programming services by Binghamton NewChannels ("NewChannels") of Binghamton, New York. In response to this complaint, the Commission issued Letter of Inquiry 93-48 ("LOI") to NewChannels on December 13, 1993.[1] The LOI asked NewChannels to provide information concerning its compliance with the Commission's rules governing evasion in the offering of packages which allegedly are not rate-regulated. NewChannels responded to our LOI on January 12, 1994.

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Congress created a regulatory scheme giving the Commission and local franchising authorities jurisdiction over the cable programming and equipment rates of non-competitive cable systems. The 1992 Cable Act provides that the rates of cable systems not subject to effective competition may be regulated by local franchising authorities, in the case of basic service, and by the Commission, in the case of cable programming service.[2] A stated policy of the 1992 Cable Act is to ensure that "consumer interests are protected in the receipt of cable service."[3]

3. The 1992 Cable Act requires cable operators to offer subscribers a basic tier that must contain at least all qualified local broadcast signals and, unless otherwise specified by the local franchising authority, public, educational, and governmental channels.[4] The Commission was charged by the 1992 Cable Act with creating regulations that ensure that the rates for the basic service tier are reasonable.[5] The 1992 Cable Act directs that "[s]uch regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[6] Under the 1992 Cable Act, operators may offer other channels in a cable programming service tier or tiers.[7] The 1992 Cable Act orders the Commission to create regulations for the cable programming service tiers that allow it to identify individual cases of unreasonable rates.[8] The 1992 Cable Act thus protects consumers' interests in continuing to receive the basic service tier and cable programming service tiers at reasonable rates.

4. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[9] The 1992 Cable Act's legislative history states that the Commission should scrutinize offerings of non-traditional stand-alone services to "prevent repricing, retiering, or other alterations of rate structures" that could have the effect of evading the purposes of rate regulation.[10] This provision in the 1992 Cable Act is intended to give the Commission the authority to address changes in the cable industry's business practices that would thwart the intent of rate regulation.[11]

5. In the *Rate Order* the Commission defined evasion as "any practice or action which avoids the rate regulation provisions of the Cable Act or Commission rules contrary to the intent of the Act or its underlying policies."[12] We must scrutinize a particular operator's marketing or pricing practices to determine whether those practices have the effect of avoiding the requirements of our rate regulations, contrary to the intent of the 1992 Cable Act and our rules.

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[1] Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to NewChannels Cable TV, Binghamton, NY, LOI 93-48 (December 13, 1993). Copies of the Letter of Inquiry and Response are available to the public in the FCC's Cable Reference "Center, 2033 M Street, N.W., Room 333, Washington, D.C. We also note that there is a pending rate complaint proceeding involving NewChannels. Our decisions made herein will be made a part of that proceeding.

[2] Communications Act of 1934, as amended, § 623 (a)(2), 47 U.S.C. § 543 (a)(2) (1992).

[3] Pub. L. No. 102-385 § 2 (b) (4), 106 Stat. 1460 (1992); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 34 (1992).

[4] Communications Act of 1934 § 623 (b)(7)(A)(ii-iii), 47 U.S.C. § 543 (b)(7)(A)(ii-iii); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation,* MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking,* 8 FCC Rcd 5631 at ¶ ¶ 157-161 (1993) (*"Rate Order"*) (franchising authorities may require operators to carry PEG channels on tiers other than basic). 3

[5] Communications Act of 1934 § 623 (b)(1), 47 U.S.C. § 543 (b)(1).

[6] *Id.*

[7] Communications Act of 1934 § 623(l)(2), 47 U.S.C. § 543(l)(2).

[8] Communications Act of 1934 § 623 (c)(1)(A), 47 U.S.C. § 543 (c)(1)(A). Identification of individual cases of unreasonable rates is achieved by a process in which the Commission assumes jurisdiction over systems where a complaint about a cable programming service tier rate is filed.n

[9] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h).

[10] H.R. Rep. No. 628 at 79.

[11] S. Rep. No. 92, 102d Cong., 2d Sess. at 77 (1992).

[12] *Rate Order* ¶ 451.

III. FACTS

6. Before September 1, 1993, NewChannels services included a 12-channel basic tier, called Broadcast Basic, for $3.00 per month, a 20-channel cable programming service tier, called Expanded Cable, for $14.25 per month, a 4-channel cable programming service tier, called Tier 1, for $4.75 per month, and a 5-channel cable programming service tier, called Tier 2, for $4.75 per month. Tier 1 consisted of Madison Square Garden (MSG), SportsChannel/WSKG II, American Movie Classics (AMC) and CNBC. Tier 2 consisted of AMC, Sci-Fi Channel, Court TV, The Learning Channel (TLC) and Comedy Central.

7. The following chart summarizes NewChannels service tier offerings prior to September 1, 1993:

Offering	Channel	Price
1. Broadcast Basic	12	$ 3.00
2. Expanded Cable	20	$14.25
3. Tier 1 (w/remote)	4	$ 4.75
4. Tier 2 (w/remote)	5	$ 4.75
Total	40[13]	$26.75

8. On September 1, 1993, the date our rate regulations became effective, NewChannels restructured its service offerings. NewChannels' restructured service offerings included a 6-channel basic tier, called Basic Cable, for $4.09 per month, and a 22-channel cable programming service tier, called Standard Channels, for $15.00 per month. In addition, NewChannels offered three a la carte packages: the Superstation Package; the CablePlus Package; and the CableXtra Package. NewChannels indicates that the SuperStation Package consisted of five channels which were previously included in the Broadcast Basic tier (WNYW, WWOR, WTBS, WPIX, and WSBK). The five channels could be purchased individually for $0.20 per channel or as a package for $0.75. The CablePlus Package consisted of three channels which were formerly offered on Tier 1 (MSG, AMC and SportsChannel/WSKG II).[14] Two channels, MSG and SportsChannel/WSKG II, could be purchased individually for $1.25 each and the third channel, AMC, was available for $0.75. The three channels could be purchased as a package for $2.50. The CableXtra package consisted of the five channels previously contained on Tier 2. Four of the five channels were available individually for $0.70 each and the fifth channel, AMC, was offered for $0.75. The five channels could be purchased as a package for $2.50.

9. The following chart summarizes NewChannels' service tier options as of the date of its response to our LOI:[15]

Offering	Channels	Price
1. Basic Cable	6	$ 4.09
2. Standard Channels	22	$15.00
3. SuperStation Package	5	$ 0.75
4. CablePlus Package	3	$ 2.50
5. CableXtra Package (CablePlus and CableXtra - combined	5 7	$ 2.50 $ 4.00)
Total	40[16]	$24.84

10. As of December 31, 1993, 61,734 subscribers received the Superstation Package; 11,881 received the CablePlus Package; 2,856 received the CableXtra Package; and 12,604 received the combination CablePlus/CableXtra offering. The number of subscribers taking the individual channels were as follows: for the channels offered in the Superstation Package, only 11 subscriptions to individual channels were made; for the CablePlus Package, 651 were made; and for the CableXtra Package, 924 were made.[17] The most heavily subscribed individual channel was AMC, which was purchased individually by 499 customers through either the CablePlus or CableXtra Packages. Based on these figures, assuming a best case scenario for NewChannels, each subscription to an individual channel represents a consumer; less than 2 percent of NewChannels' customers subscribing to any part of the offered packages elected to subscribe to individual channels, indicating that essentially no one considered that they had a "realistic choice." This analyzes the facts most favorably to NewChannels because it assumes that each subscription represents a subscriber.

IV. DISCUSSION

11. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[18] An evasion, as defined by the Commission, is an act or practice that "avoids the rate regulation provisions of the [Cable] Act or our rules contrary to the intent of the Act or its underlying policies."[19] In the *Rate Order*, we stated that "retiering otherwise permitted under our rules will not be deemed an evasion."[20] First, we examine whether NewChannels' response to the LOI shows that its restructuring of its offerings had the effect of evading rate regulation for the channels that Congress intended to be rate-regulated.

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[13] AMC was offered on both Tier 1 and Tier 2 prior to September 1, 1993. We have only counted it once in our Total number of channels.

[14] As part of its restructuring, NewChannels moved CNBC from Tier 1 to the Standard Channels cable programming service tier.

[15] This Order does not evaluate NewChannels's rates for its basic and cable programming service tiers. These rates are subject to review by the local franchising authority and the Commission in separate proceedings.

[16] AMC was offered on both CablePlus and CableXtra as of September 1, 1993. We have only counted it once in our Total number of channels.

[17] In its response, NewChannels does not distinguish between the number of subscribers taking AMC through the Cable Plus Package versus those taking it though the CableXtra Package. Therefore, for purposes of this description, all subscribers taking AMC through either package are accounted for under the Cable Plus package. This accounting does not materially affect the findings made in this order.

[18] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h).

[19] *Rate Order* ¶ 451.

[20] *Id.* at ¶ 453.

12. NewChannels' restructuring involved its offering of five channels previously offered on its basic service tier on an individual and package basis, and its collapsing of two of its cable programming service tiers, to create the three packages (SuperStation, CablePlus and CableXtra) that it alleges are not rate-regulated. Thus, with respect to the SuperStation Package, NewChannels removed channels from the otherwise rate-regulated Broadcast Basic tier to create a new package of channels. As to the CablePlus and CableXtra Packages, NewChannels' offering of the component channels on an individual basis purportedly removed Tiers 1 and 2 from rate regulation. NewChannels fundamentally changed its service to subscribers by removing a total of 12[21] channels from rate regulation and by eliminating two entire cable programming service tiers. In so doing, NewChannels avoided application of our rate regulations to 12 channels which generally required cable operators to reduce rates by about ten percent. That is, if NewChannels had not restructured on September 1, 1993, it would have been required to recalculate its rates in accordance with the *Rate Order* we released on May 3, 1993, which generally required cable operators to reduce their rates.

13. We believe that NewChannels has not provided a sufficient justification for this change to overcome our finding that there is an evasion of rate regulation. To the contrary, it appears that few customers opted to purchase any of the channels on an individual basis; at most, less than 2 percent of NewChannels' subscribers taking any part of the 3 packages or the combination offering took individual channels.[22] Other than an attempt to evade rate regulation, there appears to be no sufficient justification for this restructuring.

14. Other factors corroborate our finding that NewChannels' restructuring had the effect of evading rate regulation. First, NewChannels restructured its Tier 1 and Tier 2 cable programming service tiers into a la carte offerings on the eve of regulation. Second, it appears that few NewChannels customers elected to exercise the purported service choice because very few customers purchased individual channels. In light of these facts, we find that NewChannels' restructuring of its offerings constituted an evasion of our rate regulations rules.

15. Because NewChannels' restructuring is a purported collective offering of a la carte channels, we also must determine whether the offering met the Commission's requirements for a permissible collective offering of a la carte channels. If the offering met the Commission's requirements for a permissible offering of a la carte channels, then NewChannels would not have evaded our rate regulations because it would not have been required to reduce its price for the collective a la carte package.[23]

16. In our *Rate Order*, the Commission recognized that "a la carte packages" appear to be "cable programming services," but said that "interpreting the statute in such a literal fashion could disadvantage consumers by denying them discounts on packages of per-channel or per-program services and by limiting subscriber access to a greater quantity of premium programming."[24] Thus, we envisioned that cable operators, for the most part, would offer channels that previously had been offered a la carte in discounted packages, and concluded that it would be better for consumers if we construed the 1992 Cable Act to permit such discounting.[25] This is not the type of offering that NewChannels and others have provided their subscribers. Specifically, these operators did not offer a discounted package of channels that previously had been offered a la carte to subscribers, but instead removed channels from a tier that would be subject to our rate regulations.

17. Moreover, in the *Rate Order*, the Commission determined that such a la carte packages would be exempt from rate regulation, i.e., would be deemed not to fall within the definition of "cable programming service," if two conditions were met: (1) the price for the combined package must not exceed the sum of the individual charges for each component service; and (2) the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the package. The Commission said that the second condition would be satisfied only when "the per channel offering provides consumers with a realistic service choice."[26]

18. Under the two-part test that we set forth in the *Rate Order*, it is clear, first, that the prices for the combined packages do not exceed the sum of the individual charges for the channelsPthat comprise the packages, because the sum of the per channel prices is $1.00 for SuperStation; $3.25 for CablePlus; and $3.55 for CableXtra, in contrast to the package prices of $ .75 per month for Superstation; $2.50 per month for CablePlus; and $2.50 per month for CableXtra. The second part of the test is whether the separate parts of the package constitute a "realistic service

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[21] Because AMC is offered twice (in both the CablePlus and CableXtra Packages), the total number of channels removed from rate regulation is 12. *See* fn.16, *supra*.

[22] *See* ¶ 10, *supra*.

[23] In our *Going Forward Order*, we have reconsidered our regulatory treatment of collective offerings of a la carte channels. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94 - 286 (adopted November 10, 1994) *("Going Forward Order")*. Specifically, we have determined that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at ¶ 46. However, in order to determine whether NewChannels evaded rate regulation when it restructured its offering, we must evaluate its a la carte package under the rules that were in effect when it restructured.

[24] *Rate Order* ¶ 329.

[25] *See, e.g., Rate Order* ¶ 453 n.1161 ("There is no evidence that operators would or, as a business matter, could shift programming previously offered as part of a tier to 'a la carte' status, *i.e.*, a per-channel or per-program offering, to avoid the rate regulation applicable to tiers").

[26] *Id.* at ¶ ¶ 327-28 & n.808. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994) (*"Second Reconsideration Order"*), the Commission affirmed its prior view. It said that "we continue to believe that the public interest will be served by generally permitting non-regulated treatment of collective offerings of 'a la carte' channels if the offering enhances consumer choice and does not constitute an evasion of rate regulation." *Second Reconsideration Order* ¶ 194. In this regard, we retained the two-part test contained in the *Rate Order* for determining when we would refrain from regulating "a la carte packages." In addition, the Commission set out 15 guidelines to enable operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings." *Id.* at ¶ 195.

offering." The results of our review of NewChannels' submission reveal that more than 98 percent of NewChannels' subscribers who purchase any part of the a la carte packages did not choose to subscribe to individual channels.[27] This fact, together with the other factors present in this case,[28] tends to show, in this instance, that the per-channel offerings do not constitute a realistic service offering.

19. Even if we were to apply the 15 interpretative guidelines set forth in our *Second Reconsideration Order*,[29] we still would conclude that NewChannels' offerings do not constitute a realistic service offering. NewChannels' submission reveals additional evidence weighing against a finding that its individual a la carte channels constitute a realistic service offering. The most important factor, of course, is that "an entire regulated tier has been eliminated and turned into an 'a la carte' package."[30] Moreover, a "significant percentage" of channels in the package "were removed from regulated tiers," which would "weigh against unregulated treatment."[31] In this case, 100 percent of the channels in the packages were removed from regulated tiers.

20. In our recently adopted *Going Forward Order*, we have reconsidered our rules relating to a la carte packages and concluded that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act. In reaching this conclusion in the *Going Forward Order*, we acknowledged that, as applied to many fact patterns, we did not provide a clear test in the *Rate Order* and the *Second Reconsideration Order* for determining whether an a la carte package was permissible.[32]

21. We do not believe, however, that our a la carte rules are unclear as applied to the fact pattern at issue in this case. In the *Rate Order* we stated that a cable operator could not escape rate regulation simply by calling what otherwise would be a rate-regulated tier an a la carte package.[33] We reiterated this admonition in the *Second Reconsideration Order* when we warned against eliminating "an entire regulated tier" and "turning it into an a la carte package."[34] This, however, is exactly what NewChannels did by moving three of the channels that previously had been offered as Tier 1 and the five channels that previously had been offered as Tier 2 to allegedly unregulated packages. (As noted, NewChannels also moved five channels from its basic service tier to the allegedly unregulated Superstation package.) While we have acknowledged that aspects of our evaluation of a la carte packages were unclear,[35] as applied to these particular facts, this prong of the test is clear and requires no additional guidance or explanation from the Commission. In light of the fact that it is clear that elimination of an entire tier and transformation of that tier into an a la carte package is an evasion of rate regulation, we find that NewChannels' retiering in fact clearly constitutes just such an evasion.[36]

22. We find that NewChannels' Superstation, CablePlus and CableXtra packages, as the offerings existed in Binghamton, New York, on December 13, 1993, the date of our LOI, must be treated as rate-regulated cable programming service tiers. As a result, effective 90 days from the release date of this Order, NewChannels either must offer the channels in these packages as part of the respective rate-regulated tiers from which they came or offer the channels collectively as separate rate-regulated tiers of cable programming service.[37] We further conclude that these packages are rate-regulated offerings as of September 1, 1993, and that the channels composing them must be counted as rate-regulated channels for purposes of rate justification as of that date.

V. ORDERING CLAUSES

23. Accordingly, IT IS ORDERED that NewChannels' Superstation, CablePlus and CableXtra Packages are subject to rate regulation as of September 1, 1993, and the channels composing them must be counted by NewChannels as rate-regulated channels for purposes of rate justification, as of that date.

24. IT IS FURTHER ORDERED that, effective 90 days from the release date of this Order, NewChannels either must offer these channels as part of the respective rate-regulated tiers from which they came or offer the channels collectively as separate rate-regulated tiers of cable programming services.

25. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[27] *See* ¶ 10, *supra*.
[28] *See, e.g.*, ¶ ¶ 12-14, *supra*.
[29] *Second Reconsideration Order* ¶ 196.
[30] *Id.*
[31] *Id.*
[32] In adopting the 15 interpretive guidelines in the *Second Reconsideration Order* to supplement the *Rate Order's* two-prong test, we hoped to enable operators to better determine what collective offerings of a la carte channels would be considered an evasion of rate regulation. *See Going Forward Order* at ¶ 40.
[33] *Rate Order*, 8 FCC Rcd 5837, n.808 ("we do not think a cable operator can escape rate regulation simply by announcing that tiered services are available a la carte").
[34] *Second Reconsideration Order* ¶ 196.
[35] *Warner Cable Communications*, Milwaukee, Wisconsin, LOI-93-14, DA 94-1276 (released November 18, 1994).
[36] *See Adelphia Cable Partners, L.P.*, South Dade County, Florida, LOI-93-42, DA 94-1277 (released November 18, 1994).
[37] To provide 90 days gives NewChannels ample time to comply with the 30 day notice provisions of our regulations for rate and programming changes. *See* 47 C.F.R. ¶ ¶ 76.309(c)(3)(i)(B), 76.932 and 76.964. NewChannels, of course, may continue to offer any channels as single channel offerings consistent with the 1992 Cable Act and our rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Office of
Engineering and Technology

ET Docket No. 94-32

In the Matter of

Allocation of Spectrum Below
5 GHz Transferred from
Federal Government Use

ORDER

Adopted: December 27, 1994; Released: December 28, 1994

By the Chief, Office of Engineering and Technology:

1. On October 20, 1994, the Commission adopted a *Notice of Proposed Rule Making (NPRM)* in the above-captioned proceeding.[1] The specified deadlines for comments and reply comments were December 19, 1994, and January 3, 1995, respectively. On December 21, 1994, the Part 15 Coalition filed a Motion for Extension of Time in Which to File Reply Comments with the Commission in the above-captioned proceeding. The Part 15 Coalition requests that the reply comment date be extended to January 6, 1995. By this Order we are extending the reply comment date.

2. In its Motion, the Part 15 Coalition urges that the reply comment date be extended by several days due to the importance of the proceeding, the large number of comments received, and the interruption of normal business activities during the holiday season. The Part 15 Coalition points out that many businesses are closed for the entire last week of December and that most are closed on January 2, 1995, which is a national holiday. Therefore, the Part 15 Coalition argues that it will be unable to receive input from many of its members and be prepared to file adequate reply comments by January 3, 1995.

3. If we are to develop a complete record, it is important that all parties be provided sufficient opportunity to consider the large number of comments received and to develop substantive reply comments. Accordingly, IT IS ORDERED THAT the deadline for filing reply comments in response to the *Notice of Proposed Rule Making* IS EXTENDED to January 6, 1995. This action is taken pursuant to authority found in Sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i) and 303, and pursuant to Sections 0.31, 0.241, and 1.46 of the Commission's Rules, 47 C.F.R. Sections 0.31, 0.241, and 1.46.

[1] *Notice of Proposed Rule Making*, ET Docket No. 94-32, 59 Fed Reg 59393 (11/17/94).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Paging Network of Virginia, Inc. File No. 28046-CN-P/L-94

For License for Station KNKV 201 for Narrowband Nationwide Personal Communications Service on Frequency Block N-1

MEMORANDUM OPINION AND ORDER

Adopted: January 6, 1995; Released: January 9, 1995

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Order, we address a petition to deny or designate for hearing, filed September 13, 1994, by Edward Johnson (Johnson) against Paging Network of Virginia, Inc. (PNV) that requests that the Commission deny PNV's application for a license to provide personal communications service (PCS) in Frequency Block No. 1, 940.00-940.05 MHz paired with 901.00-901.05 MHz. For the reasons discussed below, we deny Johnson's petition to deny and grant PNV's application.

II. BACKGROUND

2. Between July 25, 1994, and July 29, 1994, the Commission conducted auctions for PCS licenses in the 930.00 MHz to 941.00 MHz bands (narrowband PCS). PNV, a wholly-owned subsidiary of Paging Network, Inc. (PageNet), was the high bidder for three narrowband PCS licenses, Frequency Blocks N-1, N-2 and N-10.[1] PNV's applications for these licenses were accepted for filing on August 17, 1994.[2] On September 13, 1994, Johnson filed a petition to deny (Petition) the license application of PNV for Frequency Block N-1. Johnson filed an addendum and correction to his petition on September 16, 1994 (Petition Addendum). PNV filed an opposition to the Petition on September 28, 1994 (Opposition). Johnson filed a reply and motion to strike on October 5, 1994 (Reply). PNV filed an opposition to the motion to strike on October 19, 1994 (Opposition to Motion). Johnson filed another addendum to his Petition (Second Addendum) and a motion to accept the addendum (Addendum Motion) on November 25, 1994. PNV filed a response to addendum to petition to deny or designate for hearing (Response to Second Addendum) on December 8, 1994.

III. PLEADINGS; DISCUSSION

A. Procedural Matters

3. Johnson asserts that PNV's opposition was filed late.[3] PNV replies that it timely filed its opposition.[4] Johnson is incorrect. Oppositions were due within 10 days of the filing of a petition to deny.[5] The Petition was officially received by the Commission on September 13, 1994. Because Johnson mailed his petition, PNV had an additional three days, excluding holidays, added to its response time in accordance with the Commission's rules.[6] Therefore, under our computation of time rules, oppositions to the Johnson Petition were due September 28, 1994, and replies were due October 11, 1994. PNV timely filed its opposition on September 28.

4. Johnson's Second Addendum and the accompanying Addendum Motion were not requested or authorized by the Commission and were filed over two months after the Petition was originally filed. Consequently, pursuant to Section 1.45(c) of the Commission's Rules, we dismiss these pleadings,[7] and do not consider PNV's Response to the Second Addendum.

B. Auction Rules

1. Positions of the Parties

5. As an initial matter, Johnson asserts that the Commission's licensing process is flawed. Johnson argues that mutual exclusivity was not established by the acceptance for filing of license applications as required by Section 309(j)(1) of the Communications Act of 1934, as amended (Act)[8] and insists that FCC Form 401 should have been received, with applicants submitting FCC Form 175 only after mutual exclusivity is established.[9] Johnson further asserts that the Commission's auction rules violate the Administrative Procedure Act (APA) because the rules permit "massive" auction changes by public notice, as opposed to the APA mandated notice and comment procedure.[10] Johnson also contends that the upfront pre-auction payment has the effect of "snuffing out all minority voices" under the pretext of assessing financial qualifications.[11]

6. PNV replies that the auction procedures adopted by the Commission, requiring submission of an FCC Form 175 with only the winner at the auction submitting an FCC Form 401, are well within the Commission's discretion.[12] PNV contends that Johnson's premature submission of FCC Form 401 could not serve as the basis for an

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[1] "Announcing the High Bidders in the Auction of Ten Nationwide Narrowband PCS Licenses; Winning Bids Total $617,006,674," Mimeo 44177 (Aug. 2, 1994).
[2] "Narrowband PCS Nationwide Auction Winners," Report No. PCS-NB-94-1, Mimeo 44394 (Aug. 17, 1994).
[3] Reply at 1.
[4] Opposition to Motion at 1.
[5] *See* Public Notice, Report No. PCS-NB-94-1, Mimeo No. 44394 (Aug. 17, 1994).
[6] *See* 47 CFR § 1.4(h).
[7] *See* 47 CFR § 1.45(c).
[8] 47 U.S.C. § 309(j)(1).
[9] Petition at 2 and Attachment 1.
[10] *Id.* at 2-3.
[11] *Id.* at 3.
[12] Opposition at 2.

exclusive grant of the license.[13] Moreover, argues PNV, with the market value of this license established at $80 million, Johnson's pending litigation is a waste of the parties' and the Commission's time and resources unless Johnson can demonstrate that he is currently financially qualified not only to pay the required market price but also to construct a narrowband PCS system. PNV asserts that absent proof of financing to bid on a frequency and complete construction of service facilities pursuant to the Commission's rules, Johnson's objections to the application are moot since granting the relief requested would confer no benefit upon him.[14]

2. Discussion

7. Before we address Johnson's specific allegations against the PNV application, we will discuss the general objections Johnson attempts to raise against the Commission's auction and licensing rules for narrowband PCS. Initially, we observe that Johnson's claims that the Commission's licensing process is flawed are more properly raised in the context of a proceeding in which parties may seek reconsideration of the Commission's PCS auction rules. Nevertheless, we note that the questions Johnson seeks to raise here concerning the appropriateness of the use of public notices in furtherance of the Commission's auctions proceedings and the Commission's need for discretion and flexibility in structuring and conducting auctions, have already been fully addressed by the Commission.[15]

8. Mutual exclusivity for nationwide narrowband PCS licenses was established by the filing of Form 175 by sixty-seven interested parties.[16] The Commission's rules expressly require the filing of a Form 175 to participate in the auction.[17] If more than one such application is filed for each frequency block, then mutual exclusivity is established and the license for such frequency block will be auctioned.[18] Only after a bidder is officially notified that it is the winning bidder is such entity required to file a Form 401.[19] Johnson's Form 175 was found to be incomplete and rejected, as was his requested waiver of the upfront payment requirement.[20] During the pendency of his Form 175 filing, he filed a Form 401, which was also rejected.[21]

9. Finally, with regard to Johnson's claim that the requirement of an upfront payment has the effect of "snuffing out minority voices," again, general objections to this rule should have been raised in the context of a timely petition for reconsideration of the rules. In implementing Sections 1.2108 and 24.405, the Commission provided the requisite notice and comment period and received comments that largely favored the imposition of an upfront payment requirement.[22] Johnson himself indicated support for some sort of fixed upfront payment. [23]

C. Petition to Deny

1. Legal Standard

10. Section 309 of the Act requires that the Commission consider allegations raised in a petition to deny an application. Parties filing a petition to deny must satisfy the two-step test established in Sections 309(d)(1) and (2) of the Act.[24] As the D.C. Court of Appeals explained, "[a]t the threshold, the protesting party must submit a petition containing specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent with the [public interest, convenience, and necessity]."'[25] The Commission is required to make this threshold determination based on an evaluation of the petition and its supporting affidavits.[26]

11. If the Commission determines that the petition to deny satisfies the threshold standard, the Commission performs a second evaluation. Specifically, the Commission examines "the application, the pleadings filed, or other matters which it may officially notice" to determine whether "a substantial and material question of fact is presented."[27] If the Commission is faced with a substantial and material question of fact or if the Commission for any reason cannot find that granting the application would be in the public interest, convenience, or necessity, the Commission must designate the application for a hearing.[28] If the Commission determines that there are no substantial and material questions of fact and if a grant of the application would be consistent with the public interest, convenience, and necessity, the Commission then should grant the application, deny the petition, and issue a concise statement of the reasons for denying the petition. Even where there are disputed factual issues, there is no auto-

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[13] *Id.*

[14] *Id.* at 2-3.

[15] Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, FCC 94-215, Second Memorandum Opinion and Order, 9 FCC Rcd 7245, paras. 21-24 (Released Aug. 15, 1994); 59 Fed. Reg. 44,272 (Aug. 26, 1994) *Erratum*, Mimeo No. 50278 (Oct. 19, 1994); *petition for review filed sub nom. Association of Independent Designated Entities v. FCC*, Nos. 94-1641 and 94-1642 (D.C. Cir. filed Sep. 26, 1994).

[16] *See* Rule Interpretation and Waiver Requests for the Auction of Ten Nationwide Narrowband Personal Communications Service Licenses, Auction No. 1, FCC Form 175, File No. AUC-1, DA 94-768, Order, at para. 1 (Released July 11, 1994).

[17] *See* 47 CFR §§ 1.2105(a), 24.409(a).

[18] *See* Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Second Report and Order, PP Docket No. 93-253, 9 FCC Rcd 2348, 2376-77, paras. 164-168 (1994) (*Competitive Bidding Second Report*).

[19] *See* 47 CFR §§ 1.2107(c), 24.409(b).

[20] *See* Rule Interpretation and Waiver Requests for the Auction of Ten Nationwide Narrowband Personal Communications Service Licenses, Auction No. 1, FCC Form 175, File No. AUC-1, DA 94-768 (Com. Car. Bur. July 11, 1994), *review pending.*;

[21] *See* Petition, Attachment 1 -- Letter from J. Cimko, Chief, Mobile Services Division, Common Carrier Bureau, to E. Johnson, Re: Nationwide Narrowband PCS Application (July 22, 1994).

[22] *See Competitive Bidding Second Report*, 9 FCC Rcd at 2377-81, paras. 169-188.

[23] *See id.* at para. 169.

[24] *See* 47 U.S.C. §§ 309(d)(1), (2).

[25] *Astroline Communications Company Limited Partnership v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988), *quoting* 47 U.S.C. § 309(d)(1).

[26] &m P37I&P *See id.* at 1561.

[27] *See* 47 U.S.C. § 309(d)(2). *See also Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392 (D.C. Cir. 1985).

[28] *See* 47 U.S.C. § 309(d)(2). *See also* Section 1.2109 of the Commission's Rules, which establishes the procedures for filing petitions to deny against long-form applications.

matic hearing requirement. As the D.C. Circuit has observed, a hearing would not be required "to resolve issues which the Commission finds are either not 'substantial' or 'material,' regardless of whether the facts involved are in dispute."[29]

2. Qualifications of Applicant

(a) Positions of the Parties

12. With regard to the applicant, Johnson asserts that PNV is not legally or financially qualified.[30] Specifically, Johnson argues that PNV added and deleted shareholders after the filing of its Form 175 application in violation of Sections 1.2105(a)(2)(viii)[31] and 24.422(b)[32] of the Commission's Rules.[33] Johnson contends that despite the fact that the Commission relaxed this rule on August 17, 1994, PNV was required to comply with the rules in effect at the time it applied with the Commission, which was July 1, 1994.[34] Johnson further asserts that Standard and Poor's (S&P) recently changed its ratings outlook for PageNet to negative because $500 million of debt is still outstanding for PageNet.[35] Johnson further argues that PageNet suffered a $20 million operating loss last year and continues to lose money, raising questions about the solvency of PageNet. Therefore, asserts Johnson, the Commission must hold a hearing to determine the financial qualifications of PageNet.[36]

13. Responding to Johnson's specific charges, PNV contends that Johnson's attacks are based on hearsay or unidentified sources and do not satisfy the Commission's requirement that a petitioner make allegations sufficient to demonstrate that a grant would be *prima facie* inconsistent with the public interest.[37] PNV argues that Johnson focuses not on the applicant but on PageNet, its parent. PNV asserts that Johnson does not identify what information in PNV's application became incorrect because of any public trading of PageNet's stock. PNV insists that whatever public trading there was in its parent's stock did not require any amendment to the application filed by PNV, and those changes were not barred by the rules cited by Johnson, which relate to amendments to the application (Section 24.422(b)) or agreements relating to the licenses (Section 1.2105(a)(2)(viii)).[38] Moreover, argues PNV, there is nothing in the Commission's rules or public notices to indicate that the Commission intended that any public trading in a parent entity's stock pending consideration of an application for nationwide PCS service would constitute a violation of its rules.[39] PNV contends that no legitimate public purpose would be served by a rule conforming to Johnson's interpretation since it would effectively preclude all public companies from participating in the auction, which would be arbitrary and capricious on its face.[40]

14. PNV asserts that it is financially qualified to build and operate its proposed system.[41] PNV argues that S&P, upon whose report Johnson relies to question PageNet's financial qualifications, offers investors a rating service in which it evaluates the credit condition of various companies. PNV contends that the Commission has not delegated to S&P the responsibility to assess the financial qualifications of applicants to construct and operate Commission licensed facilities. In any event, argues PNV, S&P did not find PageNet to be either insolvent or lacking in financial qualifications to build and operate a nationwide narrowband PCS system.[42]

15. With respect to the alleged losses experienced by PageNet, PNV replies that PageNet has operated at a loss for accounting purposes almost since its inception, largely because of the heavy expenditures associated with the rapid growth of its operations, which have added almost 1 million subscribers in the last year.[43] As for cash flow, PNV contends that the S&P report cited by Johnson indicated that in 1992, while PageNet had a loss of $6.8 million, it reportedly had a positive cash flow of $51 million.[44] PNV notes that in PageNet's Form 10-Q filed with the Securities and Exchange Commission in August 1994, PageNet reported a net operating loss for the quarter ending June 30, 1994, of $5.468 million, but the company's cash flow was $33 million for that period, an increase of 43.6 percent over the corresponding period in 1993.[45] PNV further asserts that in the 10-Q filing PageNet also reported that it had available approximately $148 million from the sale of notes early in 1994 and that approximately $184 million was available under its credit agreement. PNV contends that these funds coupled with the company's cash flow would be more than sufficient to cover the auction payment and the phased construction of the proposed nationwide system even without recourse to the financial markets.[46]

16. Johnson replies that PNV is incorrect to assert that the Commission does not have an interest in basic qualification findings and argues that PNV's application is incomplete because it does not purport to include such information. Johnson also asserts that its finances are not at issue and argues that while the Commission has not delegated to S&P the responsibility to assess the financial qualifications of PCS applicants, PNV has not proven that it is financially qualified to build and operate a PCS system.[47] Johnson argues that notwithstanding PNV's contention to the contrary, in its 1993 Annual Report PageNet admitted

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[29] *Hartford Communications Committee v. FCC*, 467 F.2d 408, 412 (D.C. Cir. 1972), *citing Stone v. FCC*, 466 F.2d 316, 322, 323 (D.C. Cir. 1972).

[30] It should be noted that in his petition Johnson shortens the applicant's name from Paging Network of Virginia, Inc., to "Paging." *Id.* at 1. Petitioner does not distinguish between Paging and PageNet, but in some instances it is clear that petitioner's claims actually concern PageNet, not Paging or, as we refer to the applicant, PNV.

[31] 47 CFR §1.2105(a)(2)(viii).

[32] 47 CFR § 24.422(b).

[33] Petition at 3-4, *citing* Public Notice, dated June 17, 1994.

[34] Petition Addendum at 1.

[35] Petition at 4.

[36] *Id.* at 5.

[37] Opposition at 3.

[38] *Id.* at 4.

[39] *Id.*

[40] *Id.* at 5.

[41] *Id.* at 8.

[42] *Id.* at 9.

[43] *Id.*

[44] *Id.* at 9-10.

[45] *Id.* at 10.

[46] *Id.*

[47] Reply at 2-5.

that it has outstanding debt securities. Specifically, Johnson alleges that PageNet's Annual Report indicates that 19 lenders hold a security interest in substantially all of the company's assets and the capital stock of the subsidiaries of the company.[48] Johnson argues that the Commission must hold a hearing to determine the identities of the debt security holders since these entities could have a 5 percent interest in the company.[49]

17. PNV responds that Johnson distorts the facts in several significant respects. First, argues PNV, in discussing the financing of PNV through its parent, Johnson offsets current liabilities against PageNet's cash, rather than against all current assets.[50] PNV questions why no explanation is given for this unusual accounting procedure. Further, PNV contends that the waivers required under its credit agreement have been granted and the necessary funds are available.[51] PNV also asserts that while Johnson claims that the company has insufficient cash flow, he ignores the fact that the financial statement to which he refers, as well as PageNet's Form 10-Q quarterly report submitted to the Securities and Exchange Commission, both indicate that PageNet's cash flow from operations during the first six months of 1994 exceeded $58 million.[52] PNV claims that there is nothing in Johnson's Reply that casts doubt on the ability of PNV to construct PCS facilities.[53]

(b) Discussion

18. Johnson has not established a *prima facie* case since his allegations, even if ultimately proven correct, would not constitute a violation of the Commission's rules and would not render the grant of PNV's application contrary to the public interest. Most of the issues raised in the Petition purporting to address the applicant's legal and financial qualifications actually concern PageNet, the parent of PNV, the applicant. With regard to the adding and deleting of shareholders by PageNet after PNV filed its Form 175, Johnson does not identify what information in PNV's application became incorrect as a result of this activity. Moreover, Johnson makes no allegation that the stock of PNV (the applicant) was traded. During the pendency of PNV's Form 175, Section 24.422(b) read as follows:

> In the Narrowband PCS, the only amendments to FCC Form 175 which will be permitted are minor amendments to correct minor errors or defects such as typographical errors. All other amendments to FCC Form 175, such as ownership changes or changes in the identification of parties to bidding consortia, will be considered to be major amendments. . . .[54]

Johnson claims that trading of PageNet's stock during the pendency of PNV's FCC Form 175 violated this rule. In support of his claim, Johnson cites a Public Notice issued in response to questions raised in a PCS bidders seminar.[55] At no time, however, did PNV seek to amend its Form 175. Furthermore, nothing in the Commission's rules is intended to prohibit an applicant, or, as here, the parent of an applicant, that happens to be a publicly traded corporation from continuing to have its stock traded while awaiting a determination as to whether the applicant will be permitted to participate in the auction. Rather, the rule targets those situations involving a change in control.[56] Because Johnson did not establish a *prima facie* case, we need not address the second prong of the test set forth in Section 309(d)(2) of the Act.[57]

19. Under the Commission's rules, PCS license applicants must establish that they are qualified to build and operate the systems for which they bid. As part of this process, narrowband PCS applicants first file FCC Form 175, along with an upfront payment, to participate in an auction.[58] Winning bidders are then required to submit a down payment on their winning bids and to file FCC Form 401 within ten business days after being notified that they are winning bidders.[59] It is undisputed that PNV complied with these rules. With respect to this matter, Johnson's allegations again are directed toward PageNet, not PNV. Concerning the information contained in the S&P report, the report did not find PageNet insolvent or lacking the financial qualifications to build and operate a PCS system.[60] We therefore conclude that Johnson has not established a *prima facie* case with regard to this issue because even if the statements concerning the level of debt carried by PageNet are true, there is nothing in the Commission's rules that prohibits a licensee, or the parent of a licensee, from taking on debt or that requires that the parent maintain a certain S&P rating outlook. Moreover,

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48 *Id.* at 5.
49 *Id.* at 5-6.
50 Reply to Opposition at 1-2.
51 *Id.* at 2.
52 *Id.*
53 *Id.*
54 59 Fed. Reg. 26,753 (May 24, 1994).
55 *See* "Answers to Questions From the June 6, 1994 FCC Bidders Seminar for the Auction of Personal Communications Services (PCS) Licenses and Interactive Video and Data Service Licenses," (June 17, 1994).
56 *Competitive Bidding Second Report,* 9 FCC Rcd at 2376-77, paras. 166-168 (1994); Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, Third Report and Order, 9 FCC Rcd 2941, 2958, para. 43 (1994). The cited rules have since been amended to permit amendments to pending applications reflecting ownership changes not constituting a change in control. *See* Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, and Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, GEN Docket No. 90-314 and ET Docket No. 92-100, FCC 94-219, Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 9 FCC Rcd, para. 30 (Released August 17, 1994) (*Competitive Bidding Third Memorandum Opinion and Order).* Section 24.422(b) now reads:

> Applicants will also be permitted to amend FCC Form 175, to make ownership changes or changes in the identification of parties to bidding consortia, provided such changes do not result in a change of control of the applicant. . . . 47 CFR § 24.422(b).

57 47 U.S.C. § 309(d)(2).
58 *See* 47 CFR §§ 24.305, 24.306.
59 &m P37l&P *See* 47 CFR §§ 24.306(b), 24.307.
60 We note that nothing in the Commission's rules makes information contained in reports of rating agencies, such as S&P, determinative on the matter of an applicant's financial qualifications.

there is nothing in the Petition that establishes that PNV and PageNet are not financially qualified to build and operate a nationwide narrowband PCS system, or that granting PNV's application is contrary to the public interest.

3. Completeness of PNV's Application

(a) Positions of the Parties

20. Johnson also argues that PageNet's application is not complete. Johnson contends that Section 24.413(a) of the Commission's Rules[61] requires PageNet to list the names, addresses, and citizenship of any person holding 5 percent or more of each class of debt security. Johnson asserts that PageNet offered $300 million in senior subordinated notes due 2006 at par, yet has failed to identify the entities holding these debt securities. Johnson further argues that while PageNet listed two shareholders with a 5 percent or greater interest, PageNet omitted the Golder Thoma Fund which, according to S&P's report, owns 7 percent of PageNet. Johnson states that in January 1994, the Golder Thoma Fund reported that it had distributed 12.8 million shares of PageNet to the fund's 22 limited partners. Johnson argues that PageNet should have listed the identity and citizenship of these limited partners.[62] Johnson also asserts that PageNet's response to question 14 of FCC Form 401, where the applicant indicated that "one or more applications may have been denied", is incomplete. Johnson insists that PageNet is required to report any instance where a license, permit, or application has been revoked or denied.[63]

21. With regard to Johnson's allegations of incompleteness, PNV asserts that it has provided more information than required by the Commission's rules because Section 24.413 requires the applicant, not the parent, to list the name, address, and citizenship of persons holding 5 percent or more of each class of debt security. PNV asserts that it has provided the required information by advising that it is a wholly-owned subsidiary of PageNet. Further, PNV contends that it has no outstanding debt securities.[64] PNV admits that PageNet issued $300 million of notes to the public earlier this year but questions why the Commission would be interested in such debt instruments since they do not have a conversion feature and therefore do not represent a future ownership interest.[65] Moreover, argues PNV, Section 24.413(a) is modelled after Section 22.13(a)(1) of the Commission's Rules[66] which the Commission has interpreted as being aimed at ensuring disclosure of other ownership interests involving other mobile radio services.[67] PNV insists that it has identified all parties holding 5 percent or more of the stock of PNV and PageNet. Concerning Johnson's demand that PageNet reveal the identities of the limited partners receiving distributions of PageNet stock from the Golder Thoma Fund, PNV replies that the distribution was made pursuant to Commission approval and upon application.[68]

22. With regard to its answer to question 14 on FCC Form 401, PNV replies that it did submit a complete response. PNV contends that it has had no applications revoked or denied by the Commission. PNV also asserts that no applications of any PageNet subsidiaries have been denied for matters relating to the basic qualification of that subsidiary or of PageNet to be a licensee, but might have been denied for technical reasons.[69] PNV argues that the Commission is unlikely in this proceeding to have an interest in applications denied because the site selected was too close to another site, but that PNV will furnish such information to the Commission upon request.[70]

(b) Discussion

23. Section 24.413 of the Commission's Rules requires all applicants to list certain ownership information, including all partners, subsidiaries, affiliates, and all persons holding 5 percent or more of the stock, warrants, options, or debt securities of the applicant.[71] It is undisputed that applicant PNV, a wholly-owned subsidiary of PageNet, complied with this rule by identifying PageNet as owning 100 percent of PNV's stock, and listing all of its affiliates.[72] The dispute between the parties centers around whether PageNet revealed all companies holding 5 percent or more of the stock of PageNet. As described above, Johnson's claim that PageNet failed to list one stock holder owning 7 percent of PageNet, is based on an S&P report. At this stage we are required to examine the petition and supporting affidavits "for concrete factual assertions which if proved in a subsequent hearing would alter the Commission's public interest calculus."[73] Johnson, however, does not claim to have personal knowledge of PageNet's ownership composition. Additionally, Johnson did not submit an affidavit from an individual with personal knowledge of these facts. Therefore, this question is not properly before us because Johnson has not established a *prima facie* case.

24. With regard to the alleged incompleteness of PNV's answer to question 14 on FCC Form 401, it is the case that, as a general matter, applicants are required to answer all questions in the application. Question 14 reads as follows:

> Has applicant or any party to this application had any FCC station license or permit revoked or had any application for permit or renewal denied by this Commission?

PNV responded in the negative, but then attached Exhibit 2 to Form 401, in which PNV states that:

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[61] 47 CFR § 24.413(a).
[62] Petition at 6.
[63] *Id.*
[64] Opposition at 5-6.
[65] *Id.* at 6.
[66] 47 CFR § 22.13(a)(1).
[67] Opposition at 6.
[68] *Id.* at 7-8 & n.7.
[69] *Id.* at 10-11.
[70] *Id.* at 11.
[71] *See* 47 CFR § 24.413. *See also Competitive Bidding Third Memorandum Opinion and Order*, 9 FCC Rcd at ____, para. 30.
[72] Pursuant to Section 24.413(a)(2), an affiliate includes "any business which holds a five percent or more interest in the applicant, or any business in which a five percent or more interest is held by another company which holds a five percent interest in the applicant." Thus, affiliates of PNV include the other wholly owned subsidiaries of PageNet, which are listed in Exhibit 3, Attachment 1, of PNV's application.
[73] *See Gencom Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987).

> [i]t is possible that one or more applications filed by a subsidiary may have been denied for technical or other similar reasons, but none has been denied on the ground that Paging Network, Inc. or its subsidiary lacked the basic qualifications required for a grant.

Johnson argues that this answer is incomplete. We disagree. PageNet asserts that it has never had a permit or license revoked or denied because it did not meet the Commission's qualification requirements. This response is substantially complete and satisfies the Commission's rules. Therefore, Johnson has not established a *prima facie* case that the public interest would not be satisfied if we grant PNV's application.

4. McCaw/PageNet Resale Arrangement

(a) Positions of the Parties

25. Johnson also argues that PageNet's resale agreement with another PCS auction high bidder, McCaw Cellular Communications (McCaw), raises questions as to whether the intended aggregate limit on PCS spectrum holdings was circumvented. Johnson contends that a hearing is required to determine the public interest of this pre-auction agreement.[74]

26. PNV objects to Johnson's allegations regarding the arrangement recently entered into between PageNet and McCaw. PNV asserts that under the arrangement McCaw will resell PageNet's paging services, not its PCS services, in markets where PageNet operates but McCaw does not currently do business. PNV asserts that the private carrier paging and common carrier paging frequencies involved in the McCaw arrangement are not part of the personal communications services and, therefore, are not subject to an aggregation cap. In any event, argues PNV, any concern about exceeding the aggregation cap would relate to McCaw, not PageNet. Moreover, contends PNV, the Commission has preliminarily concluded that spectrum used by resellers will not count against the reseller's spectrum cap.[75]

(b) Discussion

27. With regard to PageNet's agreement with McCaw, Johnson's expressed concern is groundless. The arrangement concerns PageNet's paging services, *not* PNV's narrowband PCS service. The Commission's spectrum aggregation limits do not include spectrum for paging providers or resellers.[76] Therefore, there is no violation of the Commission's rules and no reason to conclude that this arrangement would some how force us to conclude that a grant of PNV's application would be *prima facie* inconsistent with the public interest, convenience, and necessity.

5. Loan Covenants

(a) Positions of the Parties

28. Johnson asserts in his Reply that PageNet has violated the Commission's rules, which require that the applicants have unfettered control, by entering into written covenants with the unidentified security holders which limit the ability of PageNet to incur new indebtedness, engage in mergers and limit PageNet in any acquisitions.[77] Finally, Johnson asserts that it has made its *prima facie* showing that a license issued to PNV would be inconsistent with the public interest.[78]

29. PNV also argues that Johnson offers no support for his view that lenders hold "debt securities" as that term is contemplated under the Commission's rules. PNV contends that the Commission has never treated financial institutions lending money to regulated entities as owners or quasi-owners of those entities. PNV further asserts that the fact that the stock of PNV may be pledged in support of such loans in no way suggests that PNV has issued "debt securities."[79]

(b) Discussion

30. There is nothing in the Commission's rules that prohibits applicants or licensees from securing financing in order to do business. PageNet's annual report indicates that PageNet's assets and stock are security for the credit agreement in question.[80] This security interest in and of itself does not violate the rules since, despite Johnson's allegations to the contrary, there is nothing in the annual report that indicates that PNV has relinquished the management and control of its business. Therefore, there is no reason to conclude, based on these allegations, that a grant of PNV's application would be *prima facie* inconsistent with the public interest, convenience and necessity.

IV. CONCLUSION

31. Having reviewed the application and the pleadings filed in this matter, we conclude that grant of the subject application will serve the public interest, convenience, and necessity, and that the petitioner has not sufficiently alleged facts establishing that grant of the application would be inconsistent with the public interest, convenience and necessity.

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[74] Petition Addendum at 1-2.

[75] Opposition at 12, *citing* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Further Notice of Proposed Rule Making, GN Docket No. 93-252, 9 FCC Rcd 4400 (1994).

[76] *See* Amendments to Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Amendment of Part 90 of the Commission's Rules To Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Amendment of Parts 2 and 90 of the Commission's Rules To Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool, GEN Docket No. 93-252, PR Docket No. 93-144, PR Docket No. 89-553, Third Report and Order, para. 267 (Released Sept. 23, 1994); Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Fourth Report and Order, GEN Docket No. 93-252, FCC 94-270, paras. 8-11 (Released Nov. 18, 1994).

[77] Reply at 6-7.

[78] *Id.* at 7.

[79] Opposition to Motion at 2.

[80] Reply, Attachment 5 (1993 Annual Report of PageNet, page 28).

V. ORDERING CLAUSES

32. Accordingly, IT IS ORDERED that the Petition to Deny filed by Edward M. Johnson IS DENIED.

33. IT IS FURTHER ORDERED that the Motion to Strike filed by Edward M. Johnson IS DENIED.

34. IT IS FURTHER ORDERED that the Motion to Accept an Addendum to the Petition to Deny filed by Edward M. Johnson IS DISMISSED.

35. IT IS FURTHER ORDERED that the application of Paging Network of Virginia, Inc. (File No. 28046-C-P/L-94) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Regina M. Keeney
Chief, Wireless Telecommunications Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LOWELL CABLE TELEVISION DEPARTMENT

Petition for Revocation

of the Certification of
Vergennes Township, MI
to Regulate Basic Cable Service Rates
(MI0744)

MEMORANDUM OPINION AND ORDER

Adopted: January 3, 1995; Released: January 4, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On March 8, 1993, Lowell Cable Television Department, d/b/a Lowell Cable TV ("Lowell")[1] filed a petition for revocation challenging the certification of Vergennes Township, MI ("the Township") to regulate rates for basic cable service and associated equipment.[2] In addition, Lowell filed a supplement to its petition in response to the Commission's July 29, 1994 Order.[3] The Township did not file an opposition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[4] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[5] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[6] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[7] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[8] Once the 30-day period for filing petitions for reconsideration has elapsed, cable operators may challenge a franchising authority's certification by filing a petition for revocation. Regardless of its grounds, however, a petition for revocation does not automatically trigger a stay of the franchising authority's power to regulate basic rates.[9]

II. DISCUSSION

3. Lowell argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the households in Vergennes Township, its franchise area.[10] Specifically, Lowell states that it serves 150 of the 826 total "households" within the Township, or 18.2% percent of the total number of "households" within the franchise area.[11] As supporting documentation, Lowell submits a copy of the relevant page from the 1990 Census[12] which indicated that there were 826 "housing units" in the franchise area. In addition, Lowell submitted a declaration under penalty of perjury from a responsible official certifying the accuracy of the data presented in the petition.

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[1] The Lowell Cable Television Department is a municipally owned corporation, operated by the City of Lowell, MI.

[2] Vergennes filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" ("FCC Form 328") on October 5, 1993. The certification became effective on November 4, 1993.

[3] *Cable Operator's Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*).

[4] Communications Act of 1934 § 623(a)(4); 47 U.S.C. § 543(a)(4).

[5] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[6] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt or administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[7] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[8] 47 C.F.R. § 76.911(c).

[9] 47 C.F.R. § 76.914

[10] The 1992 Cable Act (Communications Act of 1934 § 623(a)(2); 47 U.S.C. § 543(a)(2)) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases on which a cable system is deemed subject to effective competition is if fewer than 30 per cent of the households in the system's franchise area subscribe to the system's service. Communications Act of 1934 § 623(l)(1)(A); 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

[11] We note that Lowell, in its initial subscriber count of 155, aggregated the number of subscribers served by it and its competitor, TCI Cablevision of West Michigan. Lowell claims that TCI has 30 subscribers in the Township, while Lowell has 125 subscribers. For purposes of the low penetration test, the only relevant subscriber number is the number of subscribers of the petitioning party. Therefore, based on the information provided by Lowell in support of its petition, we initially determined this number to be 125. Lowell revised this number upward to 150 in its Affidavit of Paul Christman, Superintendent, dated March 2, 1994.

[12] As the Commission has stated previously, 1990 Census data is an appropriate source for household data. *See Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994).

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[13] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within its franchise area.[14] Lowell has met this burden. We note that initially Lowell based its effective competition claim on "housing unit" data. Our rules, however, require the use of data reflecting the number of households (*i.e.*, occupied housing units) in the franchise area.[15] The term "housing units," however, reflects both occupied and vacant housing units. Nonetheless, we note that the Census data provided by Lowell does include occupied housing unit data. According to this data, there are 788 occupied housing units within the Township. A comparison of the number of subscribers in relation to the number of households yields a penetration level of 19.0% Thus, we find that Lowell's system serving Vergennes Township is subject to effective competition. Accordingly, its petition is granted.

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the petition for revocation filed by the Lowell Cable Television Department challenging the certification of Vergennes Township, MI to regulate Lowell's basic cable rates IS GRANTED.

6. IT IS FURTHER ORDERED that the certification of Vergennes Township to regulate basic cable rates IS RESCINDED.

7. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[13] 47 C.F.R. § 76.906.

[14] 47 C.F.R. § 76.911(b)(1).

[15] *See Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). As the Commission stated in the *Third Recon. Order*, "[a]s used in the Cable Act, we presume that Congress did not intend households' to have a different meaning than in the 1990 Census that would include vacant units or even partial year vacant units." *Third Recon. Order, supra*. The term "household" is defined for purposes of the 1990 Census data as "all the persons who occupy a housing unit." Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. Thus, the term "households" reflects only occupied housing units.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

C-TEC CABLE SYSTEMS OF
MICHIGAN, INC.

Petition for Reconsideration

of the Certification of
Algoma Township, MI
to Regulate Basic Cable Service Rates
(MI0675)

MEMORANDUM OPINION AND ORDER

Adopted: January 4, 1995; Released: January 5, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On October 29, 1993, C-TEC Cable Systems of Michigan, Inc. ("C-TEC") filed a timely petition for reconsideration challenging the certification of Algoma Township, Michigan (the "Township") to regulate rates for basic cable service and associated equipment.[1] The Township filed an objection to C-TEC's petition. On August 19, 1994, both C-TEC and the Township supplemented their filings pursuant to a recent Commission Order.[2] On November 30, 1994, C-TEC filed a response to a Bureau request for an explanation of the subscriber data included in C-TEC's petitions and supplement.[3]

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[4] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[5] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[6] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[7] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[8]

II. DISCUSSION

3. C-TEC argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the0 households in Algoma Township, Michigan, its alleged franchise area.[9] The supplement to C-TEC's petition shows that the cable system currently serves 387 of the 1,801 households (that is, occupied housing units)[10] in its alleged franchise area, or 21.4 percent of the total number of households. As supporting documentation, C-TEC provides 1990 Census data[11] which shows that there are 1,801 occupied housing units in its alleged franchise area. C-TEC also submits a computer print-out with sufficient subscriber information to show that it serves 387 households in its alleged franchise area.

4. The Township asserts that C-TEC's effective competition claim is inappropriately based on areas unserved by C-TEC's cable system. First, the Township argues that pur-

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[1] The Township filed its Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition ("FCC Form 328") on October 4, 1993. The certification became effective on November 3, 1993.

[2] *Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*).

[3] Letter to Jacqueline Cleary, Counsel to C-TEC Cable Systems of Michigan (November 25, 1994).

[4] Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[5] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[6] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt or administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition.47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[7] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[8] 47 C.F.R. § 76.911(c).

[9] The 1992 Cable Act (Communications Act of 1934 § 623(a)(2), 47 U.S.C. § 543(a)(2)) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases by which a cable system will be deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the system's cable service. Communications Act of 1934 § 623(l)(1)(A), 47 U.S.C. § 543(l)(1)(a); 47 C.F.R. § 76.905(b)(1).

[10] Both the Cable Act and the Commission's rules require that effective competition be demonstrated based on the number of "households" in the franchise area. Communications Act of 1934 § 623(l)(1), 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905 (b). As the Commission stated recently, "we presume that Congress did not intend 'households' to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

[11] As the Bureau has stated recently, the 1990 Census data is an appropriate source for household data. *Effective Competition Order, supra*.

suant to a new franchise agreement which became effective on January 1, 1994, C-TEC's franchise area is limited to the area already served by C-TEC and any area in Algoma Township that C-TEC notifies the Township of its intent to serve and which C-TEC serves within six months. The Township argues that, as C-TEC's authorized area of service is limited to certain areas of the Township, it is these areas, and not the entire Township which must form the basis of any effective competition claim. In the alternative, the Township argues that C-TEC has made an affirmative decision to0 redefine its franchise area.[12] Specifically, it alleges that C-TEC has refused to respond to requests to expand service at the Township's or individuals' requests. As supporting documentation, the Township provides a map of the township with marks highlighting the areas served by C-TEC, and a copy of the relevant portions of the new franchise agreement. The Township also submits a letter and an affidavit from the Algoma Township Clerk which state that C-TEC has not responded to a specific request for extension of service and has generally refused other such requests. According to the Township, C-TEC's actual service area consists of 622 households, of which C-TEC serves 386.[13] The Township argues that under this redefined franchise area, C-TEC actually has a 62 percent penetration, and therefore has failed to overcome the presumption of the absence of effective competition.

5. In response, C-TEC disagrees with the Township's interpretation of the new franchise agreement. C-TEC emphasizes that under the franchise agreement, it is free to expand service to other areas of the Township within six months of notifying the Township. It also states that, pursuant to the new franchise agreement, it is required to expand into unserved areas of the municipality whenever the population density reaches at least 30 homes per cable mile. This requisite population density threshold decreases to 25 homes per cable mile in 1998 and 20 homes per cable mile in the year 2000. While the Township acknowledges that the franchise both permits and requires C-TEC to expand its service area in the future, it argues that unless and until that expansion occurs, the existence of effective competition should be determined on the basis of the existing authorized service area.

6. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[14] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within the franchise area.[15] C-TEC has not met this burden. C-TEC fails to base its effective competition claim on its franchise area as defined by its new franchise agreement. We are persuaded that the appropriate franchise area for purposes of effective competition is the area that C-TEC currently serves in Algoma Township. The relevant section of the new franchise agreement states that:

> *Authorized Area* shall mean the entire area from time to time within the corporate limits of the municipality, excluding, however, (a) all areas that are within such limits solely due to agreements executed under the authority of Michigan Act 425 of 1984, and (b) all areas not served by the Company on the Effective Date [January 1, 1994] unless Company notifies Municipality in writing of its intent to serve such areas and does so within 6 months of such notice.[16]

As we noted previously, the Commission defines a "franchise area" as "the area a system operator is granted authority to serve in its franchise."[17] This new agreement establishes C-TEC's franchise area as its current service area. C-TEC claims that its franchise area remains the entire township as this agreement allows and even requires it to expand into other parts of the township. We disagree. The language of the agreement states that C-TEC's "authorized area" excludes those areas that C-TEC did not serve as of January 1, 1994. Thus, unless C-TEC can demonstrate that it in fact serves all of the Township as of January 1, 1994, or that it has notified the Township of an intent to expand, we must find that C-TEC's franchise area is the area it currently serves.[18] As C-TEC has failed to submit information demonstrating that it is subject to effective competition based on its franchise area as specified in itsx franchise agreement, its petition is denied. Should C-TEC wish to submit information specific to its actual franchise area, it may do so by filing a petition for revocation pursuant to Section 76.914 of the Commission's rules. 47 C.F.R. § 76.914.

III. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that the petition for reconsideration filed by C-TEC Cable Systems of Michigan, Inc., challenging the certification of Algoma Township, Michigan to regulate basic cable rates IS DENIED.

8. IT IS FURTHER ORDERED that the automatic stay imposed by Section 76.911(c) of the Commission's Rules, as amended, 47 C.F.R. § 76.911(c) IS TERMINATED.

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[12] In its *First Order on Reconsideration* the Commission clarified its definition of "franchise area" for purposes of determining effective competition. *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, 9 FCC Rcd 1164, 1880 (1994) (*"First Recon. Order"*). Generally, "[a] franchise area is the area a system operator is granted authority to serve in its franchise." *Id.* at 1180. The Commission stated, however, that a more restricted definition of "franchise area" may be more appropriate under limited circumstances, such as when an operator "has itself, through its own conduct, self defined the areas to be served to such an extent that this redefined area accurately portrays the operator's 'franchise area.'" *Id.* at 1181. Under this standard, the franchising authority has the burden of showing that the operator has made an "affirmative decision . . . to restrict service." *Id.*

[13] The Township bases this household data on a telephone conversation with C-TEC, in which C-TEC informed the Township that its lines pass by 622 homes in Algoma Township. This conversation is mentioned in a letter from the Algoma Township Clerk, Exhibit B of the Township's objection to the petition.

[14] 47 C.F.R. § 76.906.

[15] 47 C.F.R. § 76.911(b)(1).

[16] Township of Algoma, Michigan Nonexclusive 1994 Cable Television Franchise With C-TEC Cable Systems of Michigan, Inc.

[17] *First Recon. Order*, at 1180.

[18] In light of our discussion regarding C-TEC's franchise agreement, we need not address the township's argument that C-TEC has redefined its franchise area.

9. IT IS FURTHER ORDERED that C-TEC Cable Systems of Michigan, Inc. SHALL FILE the required rate justifications on the appropriate forms with Algoma Township, Michigan within thirty days of the release date of this *Memorandum Opinion and Order* or within thirty days of receipt of notice from the franchising authority that it is regulating C-TEC Cable Systems of Michigan, Inc.'s rates, whichever is later.

10. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

C-TEC CABLE SYSTEMS OF MICHIGAN, INC.

Petition for Reconsideration

of the Certification of
Gaines Charter Township, MI
to Regulate Basic Cable Service Rates
(MI1341)

MEMORANDUM OPINION AND ORDER

Adopted: January 4, 1995; Released: January 5, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On October 29, 1993, C-TEC Cable Systems of Michigan, Inc. ("C-TEC") filed a timely petition for reconsideration challenging the certification of Gaines Charter Township, Michigan (the "Township") to regulate rates for basic cable service and associated equipment.[1] The Township filed an objection to the petition to which C-TEC filed a reply. On August 19, 1994, both C-TEC and the Township supplemented their filings pursuant to a recent Commission Order.[2] On November 30, 1994, C-TEC filed a response to a Bureau request for an explanation of the subscriber data included in C-TEC's petitions and supplement.[3]

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[4] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[5] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[6] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[7] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[8]

II. DISCUSSION

3. C-TEC argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the households in Gaines Charter Township, Michigan, its alleged franchise area.[9] The supplement to C-TEC's petition shows that the cable system currently serves 214 of the 2,582 households (that is, occupied housing units)[10] in the alleged franchise area, or 8.2 percent of the total number of households. As supporting documentation, C-TEC provides 1990 Census data[11] which shows that there are 2,582 occupied housing units in the alleged franchise area.[12] C-

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[1] The Township filed its Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition ("FCC Form 328") on September 30, 1993. The certification became effective on October 30, 1993.

[2] *Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*).

[3] Letter to Jacqueline Cleary, Counsel to C-TEC Cable Systems of Michigan (November 25, 1994).

[4] Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[5] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[6] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt or administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition.47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[7] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[8] 47 C.F.R. § 76.911(c).

[9] The 1992 Cable Act (Communications Act of 1934 § 623(a)(2), 47 U.S.C. § 543(a)(2)) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases by which a cable system will be deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the system's cable service. Communications Act of 1934 § 623(l)(1)(A), 47 U.S.C. § 543(l)(1)(a); 47 C.F.R. § 76.905(b)(1).

[10] Both the Cable Act and the Commission's rules require that effective competition be demonstrated based on the number of "households" in the franchise area. Communications Act of 1934 § 623(l)(1), 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905 (b). As the Commission stated recently, "we presume that Congress did not intend 'households' to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

[11] As the Bureau has stated recently, the 1990 Census data is an appropriate source for household data. *Effective Competition Order, supra*.

[12] The census data provided indicates that there are 5,122 occupied housing units in Gaines township, and one subdivision (Cutlerville CDP (pt.)), which accounts for 2,540 occupied housing units. C-TEC provides a chart which, based on 1990 census data for occupied housing units in Gaines, attributes 2,582 occupied housing units to Gaines (FCC Community Unit Identifier - MI1341) by apparently subtracting the number of occupied housing units listed in the 1990 census for the subdivision of Cutlerville.

TEC also submits a computer print-out with sufficient subscriber information to show that it serves 214 households in the alleged franchise area.

4. The Township asserts that C-TEC's effective competition claim is inappropriately based on areas unserved by C-TEC's cable system. First, the Township argues that pursuant to a new franchise agreement which became effective on January 1, 1994, C-TEC's franchise area is limited to the area already served by C-TEC and any area in Gaines Charter Township that C-TEC notifiesthe Township of its intent to serve and which C-TEC serves within six months. The Township argues that, as C-TEC's authorized area of service is limited to certain areas of the Township, it is these areas, and not the entire Township which must form the basis of any effective competition claim. In the alternative, the Township argues that C-TEC has made an affirmative decision to redefine its franchise area.[13] Specifically, it alleges that C-TEC has limited its service to areas where lack of competition and population density make service economically appealing. As supporting documentation, the Township provides a copy of the relevant portions of the new franchise agreement and an affidavit from a responsible official. According to the Township, C-TEC's actual service area consists of 580 households, of which C-TEC serves 211.[14] The Township argues that under this redefined franchise area, C-TEC actually has a 36.3 percent penetration, and therefore has failed to overcome the presumption of the absence of effective competition.

5. In response, C-TEC disagrees with the Township's interpretation of the new franchise agreement. C-TEC emphasizes that under the franchise agreement, it is free to expand service to other areas of the Township within six months of notifying the Township. It also states that, pursuant to the new franchise agreement, it is required to expand into unserved areas of the municipality whenever the population density reaches at least 30 homes per cable mile. This requisite population density threshold decreases to 25 homes per cable mile in 1998 and 20 homes per cable mile in the year 2000. C-TEC further states that it has requested notification from the franchising authority when the required population density level is reached, or when investigation into the economic feasibility of service to unserved areas is needed. As supporting documentation, C-TEC submits a newsletter sent to the Township containing a form for requests to extend cable service, and language of C-TEC's intent to expand when economically feasible. This information is supported by the declaration of a responsible official. While the Township acknowledges that the franchise both permits and requires C-TEC to expand its service area in the future, it argues that unless and until that expansion occurs, the existence of effective competition should be determined on the basis of the existing authorized service area.

6. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[15] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within the franchise area.[16] C-TEC has not met this burden. C-TEC fails to base its effective competition claim on its franchise area as defined by its new franchise agreement. We are persuaded that the appropriate franchise area for purposes of effective competition is the area that C-TEC currently serves in Gaines Charter Township. The relevant section of the new franchise agreement states that:

> *Authorized Area* shall mean the entire area from time to time within the corporate limits of the municipality, excluding, however, (a) all areas that are within such limits solely due to agreements executed under the authority of Michigan Act 425 of 1984, and (b) all areas not served by the Company on the Effective Date [January 1, 1994] unless Company notifies Municipality in writing of its intent to serve such areas and does so within 6 months of such notice.[17]

As we noted previously, the Commission defines a "franchise area" as "the area a system operator is granted authority to serve in its franchise."[18] This new agreement establishes C-TEC's franchise area as its current service area. C-TEC claims that its franchise area remains the entire township as this agreement allows and even requires it to expand into other parts of the township. We disagree. The language of the agreement states that C-TEC's "authorized area" excludes those areas that C-TEC did not serve as of January 1, 1994. Thus, unless C-TEC can demonstrate that it in fact serves all of the Township as of January 1, 1994, or that it has notified the Township of an intent to expand, we must find that C-TEC's franchise area is the area it currently serves.[19] As C-TEC has failed to submit information demonstrating that it is subject to effective competition based on its franchise area as specified in its franchise agreement, its petition is denied. Should C-TEC wish to submit information specific to its actual franchise area, it may do so by filing a petition for revocation pursuant to Section 76.914 of the Commission's rules. 47 C.F.R. § 76.914.

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[13] In its *First Order on Reconsideration* the Commission clarified its definition of "franchise area" for purposes of determining effective competition. *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, 9 FCC Rcd 1164, 1180 (1994) (*"First Recon. Order"*). Generally, "[a] franchise area is the area a system operator is granted authority to serve in its franchise." *Id.* at 1180. The Commission stated, however, that a more restricted definition of "franchise area" may be more appropriate under limited circumstances, such as when an operator "has itself, through its own conduct, self defined the areas to be served to such an extent that this redefined area accurately portrays the operator's 'franchise area.'" *Id.* at 1181. Under this standard, the franchising authority has the burden of showing that the operator has made an "affirmative decision . . . to restrict service." *Id.*

[14] The Township bases this household and subscriber data on a conversation with the secretary of Robin R. Troop, Vice President and General Manager of C-TEC. The Township cites 213 subscribers in its supplement, but the supporting affidavit only refers to 211 subscribers.

[15] 47 C.F.R. § 76.906.

[16] 47 C.F.R. § 76.911(b)(1).

[17] Township of Gaines, Michigan Nonexclusive 1994 Cable Television Franchise With C-TEC Cable Systems of Michigan, Inc.

[18] *First Recon. Order*, at 1180.

[19] In light of our discussion regarding C-TEC's franchise agreement, we need not address the township's argument that C-TEC has redefined its franchise area.

III. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that the petition for reconsideration filed by C-TEC Cable Systems of Michigan, Inc., challenging the certification of Gaines Charter Township, Michigan to regulate basic cable rates IS DENIED.

8. IT IS FURTHER ORDERED that the automatic stay imposed by Section 76.911(c) of the Commission's Rules, as amended, 47 C.F.R. § 76.911(c) IS TERMINATED.

9. IT IS FURTHER ORDERED that C-TEC Cable Systems of Michigan, Inc. SHALL FILE the required rate justifications on the appropriate forms with Gaines Charter Township, Michigan within thirty days of the release date of this *Memorandum Opinion and Order* or within thirty days of receipt of notice from the franchising authority that it is regulating C-TEC Cable Systems of Michigan, Inc.'s rates, whichever is later.

10. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

C-TEC CABLE SYSTEMS
OF MICHIGAN, INC.

Petition for Reconsideration

of the Certification of
Alpine Charter Township, Michigan
to Regulate Basic Cable Rates (MI0678)

MEMORANDUM OPINION AND ORDER

Adopted: January 4, 1995; Released: January 5, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On October 29, 1993, C-TEC Cable Systems of Michigan, Inc. ("C-TEC") filed a Petition for Reconsideration challenging the certification of Alpine Charter Township, Michigan (the "Township") to regulate rates for basic cable service and associated equipment.[1] The Township filed an Objection to Petition for Reconsideration ("Objection"). Both parties filed additional pleadings pursuant to the Commission's July 29, 1994 Order.[2] At the Commission's request, the Township supplied clarifying information regarding C-TEC's franchise area on December 22, 1994.[3]

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[4] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable systems within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[5] Certification becomes effective 30 days after the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[6] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days of the date such certification becomes effective.[7] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[8]

II. DISCUSSION

3. C-TEC argues that its system serving Alpine faces effective competition because the system serves fewer than 30 percent of the households in Alpine Charter Township, its alleged franchise area.[9] The supplement to C-TEC's Petition shows that the cable system serves 104 of the 1,584 households (that is, occupied housing units)[10] within the Township, its alleged franchise area, or 6.6 percent of the total number of households. As supporting documentation, C-TEC provides 1990 Census data[11] which indicates that there are 1,584 households[12] in Alpine Charter Township. In addition, it submits a copy of a computer print-out which indicates that C-TEC had 104 subscribers in its alleged franchise area as of April 9, 1994.

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[1] The Township filed its Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition ("FCC Form 328") on September 30, 1993, which became effective on October 30, 1993.

[2] *Cable Operator's Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates,* 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*).

[3] Specifically, in response to the Bureau's request, the Township submitted a copy of its franchise agreement with C-TEC.

[4] Communications Act of 1934 §623(a)(4), 47 U.S.C. §543(a)(4).

[5] 47 C.F.R. §§76.906, 76.910(b)(4).

[6] 47 C.F.R. §76.910(e). Certification becomes effective unless the Commission determines that: 1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; 2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; 3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. §76.910(b). *See also* Communications Act of 1934 §623(a)(4), 47 U.S.C. §543(a)(4).

[7] 47 C.F.R. §§1.106, 76.911, *Report and Order and Further Notice of Proposed Rulemaking,* MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[8] 47 C.F.R. §76.911(c).

[9] The 1992 Cable Act and the Commission's rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. Communications Act of 1934 §623(a)(2), 47 U.S.C. §543(a)(2); 47 C.F.R. §76.905(a). One of the bases by which a cable system will be deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the system's cable service. Communications Act of 1934 §623(l)(1)(A); 47 C.F.R. §76.905(b)(1).

[10] Both the Cable Act and the Commission's rules require that effective competition be demonstrated based on the number of "households" in the franchise area. Communications Act of 1934 § 623(l)(1), 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905 (b). As the Commission stated recently, "we presume that Congress did not intend 'households' to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration,* MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

[11] As the Commission has recently stated, 1990 Census data is an appropriate source for household data. *Effective Competition Order,* 9 FCC Rcd 3656 (1994).

[12] Because it is not authorized to provide cable service to the community of Comstock Park, and because Comstock Park's Census figures are included in Alpine Township's Census totals, C-TEC deducted the number of households in Comstock Park (2,102) from the total number of households of Alpine Township (3,686). This yields a total of 1,584 households in C-TEC's franchise area.

4. The Township's Objection argues that C-TEC is not subject to effective competition because of C-TEC's affirmative decision to limit its service area.[13] The Township states that the northern portion of Alpine Township is served by C-TEC and the southern portion is served by a competitor, TCI Cablevision of West Michigan, Inc. Despite the fact that both cable operators' franchise areas encompass all of the Township, the Township asserts that neither operator has attempted to serve a home within the other operator's "perceived" service territory -- thereby denying the citizens of the Township the benefit of actual competition.

5. In a letter accompanying its Response to C-TEC's motion for leave to file out of time, the Township states that "[b]y written agreement of the parties, the authorized area of service by C-TEC within Alpine Charter Township specifically excludes all areas not actually served by C-TEC." At the Commission's request, the Township supplied the Commission with this agreement, the new franchise agreement between the Township and C-TEC effective July 1, 1994.

6. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[14] The cable operator has the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's Rules, is present within its franchise area.[15] C-TEC has failed to meet this burden. C-TEC fails to base its effective competition claim on its franchise area as defined by its new franchise agreement. We are persuaded that the appropriate franchise area for purposes of effective competition is the area that C-TEC currently serves in Alpine Charter Township. The relevant section of the new franchise agreement states that:

> *Authorized Area* shall mean the entire area from time to time within the corporate limits of the municipality, excluding, however, (a) all areas that are within such limits solely due to agreements executed under the authority of Michigan Act 425 of 1984, and (b) all areas not served by Company on the Effective Date [July 1, 1994] (shown generally on Exhibit F) unless Company notifies Municipality in writing of its intent to serve any portion of such areas and does so within 6 months of such notice.[16]

As we noted previously, the Commission defines a "franchise area" as "the area a system operator is granted authority to serve in its franchise."[17] This new franchise agreement establishes C-TEC's franchise area as its current service area. C-TEC claims that its franchise area remains the entire township as this agreement allows and even requires it to expand into other parts of the township. We disagree. The language of the agreement states that C-TEC's "authorized area" excludes those areas that C-TEC did not serve as of July 1, 1994. Thus, unless C-TEC can demonstrate that it in fact serves all of the Township as of July 1, 1994, or that it has notified the Township of an intent to expand, we must find that C-TEC's franchise area is the area it currently serves.[18] As C-TEC has failed to submit information demonstrating that it is subject to effective competition based on its franchise area as specified in its franchise agreement, its petition is denied. Should C-TEC wish to submit information specific to its actual franchise area, it may do so by filing a petition for revocation pursuant to Section 76.914 of the Commission's rules. 47 C.F.R. § 76.914.

III. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by C-TEC Cable Systems of Michigan, Inc. challenging the certification of Alpine Charter Township, Michigan IS DENIED.

8. IT IS FURTHER ORDERED that the automatic stay imposed by Section 76.911(c) of the Commission's rules, as amended, IS TERMINATED.[19]

9. IT IS FURTHER ORDERED that C-TEC Cable Systems of Michigan, Inc. SHALL FILE the required rate justifications on the applicable forms with the Township of Alpine, Michigan within thirty days of the release date of this *Memorandum Opinion and Order* or within thirty days of receipt of notice from the Township of Alpine, Michigan that it is regulating C-TEC's rates, whichever is later.

10. This action is taken pursuant to delegated authority pursuant Section 0.321 of the Commission's Rules.[20]

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[13] In its *First Order on Reconsideration*, the Commission clarified the definition of "franchise area" for purposes of determining effective competition. *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, 9 FCC Rcd 1164 (1993) ("*First Recon. Order*"). Generally, "[a] franchise area is the area a system operator is granted authority to serve in its franchise." *Id.* at 1180. The Commission stated, however, that a more restricted definition of "franchise area" may be appropriate under limited circumstances, such as when an operator "has itself, through its own conduct, self-defined the areas to be served to such an extent that this redefined area accurately portrays the operator's 'franchise area.'" *Id.* at 1181. Under this standard, the franchising authority has the burden of showing that the operator has made an "affirmative decision . . . to restrict service." *Id.*

[14] 47 C.F.R. §76.906.

[15] 47 C.F.R. §76.911(b)(1).

[16] Charter Township of Alpine, Kent County, Michigan Nonexclusive 1994 Cable Television Franchise With C-TEC Cable Systems of Michigan, Inc.

[17] *First Recon. Order*, at 1180.

[18] In light of our discussion regarding C-TEC's franchise agreement, we need not address the Township's argument that C-TEC has redefined its franchise area.

[19] 47 C.F.R. §76.911(c).

[20] 47 C.F.R. §0.321.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

C-TEC CABLE SYSTEMS OF MICHIGAN, INC.

Petition for Reconsideration

of the Certification of
Richmond Township, MI
to Regulate Basic Cable Service Rates
(MI0692)

MEMORANDUM OPINION AND ORDER

Adopted: January 4, 1995; Released: January 5, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On October 29, 1993, C-TEC Cable Systems of Michigan, Inc. ("C-TEC") filed a timely petition for reconsideration challenging the certification of Richmond Township, Michigan (the "Township") to regulate rates for basic cable service and associated equipment.[1] The Township filed an objection to C-TEC's petition, to which C-TEC did not file a reply. On August 19, 1994, C-TEC supplemented its filings pursuant to a recent Commission Order.[2] On November 30, 1994, C-TEC filed a response to a Bureau request for an explanation of the subscriber data included in C-TEC's petitions and supplement.[3]

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[4] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[5] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[6] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[7] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[8]

II. DISCUSSION

3. C-TEC argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the households in Richmond Charter Township, Michigan, its alleged franchise area.[9] The supplement to C-TEC's petition shows that the cable system currently serves 114 of the 566 households (that is, occupied housing units)[10] in its alleged franchise area, or 20.1 percent of the total number of households. As supporting documentation, C-TEC provides 1990 Census data[11] which shows that there are 566 occupied housing units in its alleged franchise area. C-TEC also submits a computer print-out with sufficient subscriber information to show that it serves 114 households in its alleged franchise area.

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[1] The Township filed its Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition ("FCC Form 328") on September 30, 1993. The certification became effective on October 30, 1993.&

[2] *Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*).

[3] Letter to Jacqueline Cleary, Counsel to C-TEC Cable Systems of Michigan (November 25, 1994).

[4] Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[5] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[6] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt or administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition.47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[7] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[8] 47 C.F.R. § 76.911(c).

[9] The 1992 Cable Act (Communications Act of 1934 § 623(a)(2), 47 U.S.C. § 543(a)(2)) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases by which a cable system will be deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the system's cable service. Communications Act of 1934 § 623(l)(1)(A), 47 U.S.C. § 543(l)(1)(a); 47 C.F.R. § 76.905(b)(1).

[10] Both the Cable Act and the Commission's rules require that effective competition be demonstrated based on the number of "households" in the franchise area. Communications Act of 1934 § 623(l)(1), 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905 (b). As the Commission stated recently, "we presume that Congress did not intend 'households' to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

[11] As the Bureau has stated recently, the 1990 Census data is an appropriate source for household data. *Effective Competition Order, supra*.

4. The Township asserts that C-TEC's effective competition claim is inappropriately based on areas unserved by C-TEC's cable system. First, the Township argues that pursuant to a new franchise agreement which became effective on January 1, 1994, C-TEC's franchise area is limited to the area already served by C-TEC and any area in Richmond Township that C-TEC notifies the Township of its intent to serve and which C-TEC serves within six months. The Township argues that, as C-TEC's authorized area of service is limited to certain areas of the Township, it is these areas, and not the entire Township which must form the basis of any effective competition claim. In the alternative, the Township argues that C-TEC has made an affirmative decision to redefine its franchise area.[12] Specifically, it alleges that C-TEC has limited its service to the area around Reed City and parts of the Village of Heresy. As supporting documentation, the Township provides a map of the township with marks highlighting the areas served by C-TEC, a copy of relevant sections of the franchising agreement, and an affidavit from a responsible official. According to the Township, C-TEC's actual service area consists of 203 households, of which C-TEC serves 120.[13] The Township argues that under this redefined franchise area, C-TEC actually has a 59.1 percent penetration, and therefore has failed to overcome the presumption of the absence of effective competition.

5. In response, C-TEC disagrees with the Township's interpretation of the new franchise agreement. C-TEC emphasizes that under the franchise agreement, it is free to expand service to other areas of the Township within six months of notifying the Township. It also states that, pursuant to the new franchise agreement, it is required to expand into unserved areas of the municipality whenever the population density reaches at least 30 homes per cable mile. This requisite population density threshold decreases to 25 homes per cable mile in 1998 and 20 homes per cable mile in the year 2000. While the Township acknowledges that the franchise both permits and requires C-TEC to expand its service area in the future, it argues that unless and until that expansion occurs, the existence of effective competition should be determined on the basis of the existing authorized service area.

6. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[14] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within the franchise area.[15] C-TEC has not met this burden. C-TEC fails to base its effective competition claim on its franchise area as defined by its new franchise agreement. We are persuaded that the appropriate franchise area for purposes of effective competition is the area that C-TEC currently serves in Richmond Township. The relevant section of the new franchise agreement states that:

> *Authorized Area* shall mean the entire area from time to time within the corporate limits of the municipality, excluding, however, (a) all areas that are within such limits solely due to agreements executed under the authority of Michigan Act 425 of 1984, and (b) all areas not served by the Company on the Effective Date [January 1, 1994] unless Company notifies Municipality in writing of its intent to serve such areas and does so within 6 months of such notice.[16]

As we noted previously, the Commission defines a "franchise area" as "the area a system operator is granted authority to serve in its franchise."[17] This new agreement establishes C-TEC's franchise area as its current service area. C-TEC claims that its franchise area remains the entire township as this agreement allows and even requires it to expand into other parts of the township. We disagree. The language of the agreement states that C-TEC's "authorized area" excludes those areas that C-TEC did not serve as of January 1, 1994. Thus, unless C-TEC can demonstrate that it in fact serves all of the Township as of January 1, 1994, or that it has notified the Township of an intent to expand, we must find that C-TEC's franchise area is the area it currently serves.[18] As C-TEC has failed to submit information demonstrating that it is subject to effective competition based on its franchise area as specified in its franchise agreement, its petition is denied. Should C-TEC wish to submit information specific to its actual franchise area, it may do so by filing a petition for revocation pursuant to Section 76.914 of the Commission's rules. 47 C.F.R. § 76.914.

III. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that the petition for reconsideration filed by C-TEC Cable Systems of Michigan, Inc., challenging the certification of Richmond Township, Michigan to regulate basic cable rates IS DENIED.

8. IT IS FURTHER ORDERED that the automatic stay imposed by Section 76.911(c) of the Commission's Rules, as amended, 47 C.F.R. § 76.911(c) IS TERMINATED.

9. IT IS FURTHER ORDERED that C-TEC Cable Systems of Michigan, Inc. SHALL FILE the required rate justifications on the appropriate forms with Richmond

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[12] In its *First Order on Reconsideration* the Commission clarified its definition of "franchise area" for purposes of determining effective competition. *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, 9 FCC Rcd 1164, 1180 (1994) (*"First Recon. Order"*). Generally, "[a] franchise area is the area a system operator is granted authority to serve in its franchise." *Id.* at 1180. The Commission stated, however, that a more restricted definition of "franchise area" may be more appropriate under limited circumstances, such as when an operator "has itself, through its own conduct, self defined the areas to be served to such an extent that this redefined area accurately portrays the operator's 'franchise area.'" *Id.* at 1181. Under this standard, the franchising authority has the burden of showing that the operator has made an "affirmative decision . . . to restrict service." *Id.*

[13] The Township bases this household and subscriber data on information furnished for the Township by C-TEC.

[14] 47 C.F.R. § 76.906.

[15] 47 C.F.R. § 76.911(b)(1).

[16] Township of Richmond, Michigan Nonexclusive 1994 Cable Television Franchise With C-TEC Cable Systems of Michigan, Inc.

[17] *First Recon. Order*, at 1180.

[18] In light of our discussion regarding C-TEC's franchise agreement, we need not address the township's argument that C-TEC has redefined its franchise area.

Township, Michigan within thirty days of the release date of this *Memorandum Opinion and Order* or within thirty days of receipt of notice from the franchising authority that it is regulating C-TEC Cable Systems of Michigan, Inc.'s rates, whichever is later.

10. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

C-TEC CABLE SYSTEMS OF MICHIGAN, INC.

Petition for Reconsideration

of the Certification of
Wayland Township, Michigan
to Regulate Basic Cable Service Rates
(MI0825)

MEMORANDUM OPINION AND ORDER

Adopted: January 4, 1995; Released: January 5, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On October 28, 1993, C-TEC Cable Systems of Michigan, Inc. ("C-TEC") filed a timely petition for reconsideration challenging the certification of Wayland Township, Michigan (the "Township") to regulate rates for basic cable service and associated equipment.[1] The Township filed an opposition to C-TEC's petition to which C-TEC filed a reply. On August 19, 1994, both C-TEC and the Township supplemented their filings pursuant to a recent Commission Order.[2]

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[4] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[6] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[7]

II. DISCUSSION

3. C-TEC argues that its cable system is subject to effective competition because it serves fewer than 30 per cent of the households in Wayland Township, Michigan, its alleged franchise area.[8] The supplement to C-TEC's petition shows that the cable system currently serves 151 of the 872 households (that is, occupied housing units)[9] in its alleged franchise area, or 17.3 percent of the total number of households. As supporting documentation, C-TEC provides 1990 Census data[10] which shows that there are 872 occupied housing units in its alleged franchise area. C-TEC also submits a computer print-out with sufficient subscriber information to show that it serves 151 households in its alleged franchise area.

4. The Township asserts that C-TEC's effective competition claim is inappropriately based on areas unserved by C-TEC's cable system. First, the Township argues that pursuant to a new franchise agreement which became effective on January 1, 1994, C-TEC's franchise area is limited to the area already served by C-TEC and any area in Wayland Township that C-TEC notifies the Township of its intent to

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[1] The Township filed its Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition ("FCC Form 328") on September 30, 1993. The certification became effective on October 30, 1993.

[2] *Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*).

[3] Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[4] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt or administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition.47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[7] 47 C.F.R. § 76.911(c).

[8] The 1992 Cable Act (Communications Act of 1934 § 623(a)(2), 47 U.S.C. § 543(a)(2)) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases by which a cable system will be deemed subject to effective competition is if fewer than 30 per cent of the households in the system's franchise area subscribe to the system's cable service. Communications Act of 1934 §623(l)(1)(A), 47 U.S.C. § 543(l)(1)(a); 47 C.F.R. § 76.905(b)(1).

[9] Both the Cable Act and the Commission's rules require that effective competition be demonstrated based on the number of "households" in the franchise area. Communications Act of 1934 § 623(l)(1), 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905 (b). As the Commission stated recently, "we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

[10] As the Bureau has stated recently, the 1990 Census data is an appropriate source for household data. *Effective Competition Order, supra.*

serve and which C-TEC serves within six months. The Township argues that, as C-TEC's authorized area of service is limited to certain areas of the Township, it is these areas, and not the entire Township which must form the basis of any effective competition claim. In the alternative, the Township argues that C-TEC has made an affirmative decision to redefine its franchise area.[11] Specifically, it alleges that C-TEC has refused requests to expand service, and has limited its service to the highest population areas in the franchise area. As supporting documentation, the Township provides a map of Wayland Township with marks highlighting the areas served by C-TEC, and a copy of the relevant portions of the new franchise agreement. The Township also submits an affidavit from the Wayland Township Clerk which only states that the clerk is aware of instances where C-TEC has refused to expand service, without specific reference to any particular instances. According to the Township, C-TEC's actual service area consists of 297 households, of which C-TEC serves 147.[12] The Township argues that under this redefined franchise area, C-TEC actually has a 49.5 percent penetration, and therefore has failed to overcome the presumption of the absence of effective competition.

5. In response, C-TEC disagrees with the Township's interpretation of the new franchise agreement. C-TEC emphasizes that under the franchise agreement, it is free to expand service to other areas of the Township within six months of notifying the Township. It also states that, pursuant to the new franchise agreement, it is required to expand into unserved areas of the municipality whenever the population density reaches at least 30 homes per cable mile. This requisite population density threshold decreases to 25 homes per cable mile in 1998 and 20 homes per cable mile in the year 2000. C-TEC further claims that it is committed to serving not only those areas it is required to serve, but also any currently unserved areas whenever service becomes economically feasible. In support of this, C-TEC submits its community newsletter and publicly distributed leaflets that outline its plans to serve any area of the municipality whenever it becomes economically feasible. While the Township acknowledges that the franchise both permits and requires C-TEC to expand its service area in the future, it argues that unless and until that expansion occurs, the existence of effective competition should be determined on the basis of the existing authorized service area.

6. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[13] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within the franchise area.[14] C-TEC has not met this burden. C-TEC fails to base its effective competition claim on its franchise area as defined by its new franchise agreement. We are persuaded that the appropriate franchise area for purposes of effective competition is the area that C-TEC currently serves in Wayland Township. The relevant section of the new franchise agreement states that:

> *Authorized Area* shall mean the entire area from time to time within the corporate limits of the municipality, excluding, however, (a) all areas that are within such limits solely due to agreements executed under the authority of Michigan Act 425 of 1984, and (b) all areas not served by the Company on the Effective Date [January 1, 1994] unless Company notifies Municipality in writing of its intent to serve such areas and does so within 6 months of such notice.[15]

As we noted previously, the Commission defines a "franchise area" as "the area a system operator is granted authority to serve in its franchise."[16] This new agreement establishes C-TEC's franchise area as its current service area. C-TEC claims that its franchise area remains the entire township as this agreement allows and even requires it to expand into other parts of the township. We disagree. The language of the agreement states that C-TEC's "authorized area" excludes those areas that C-TEC did not serve as of January 1, 1994. Thus, unless C-TEC can demonstrate that it in fact serves all of the Township as of January 1, 1994, or that it has notified the Township of an intent to expand, we must find that C-TEC's franchise area is the area it currently serves.[17] As C-TEC has failed to submit information demonstrating that it is subject to effective competition based on its franchise area as specified in its franchise agreement, its petition is denied. Should C-TEC wish to submit information specific to its actual franchise area, it may do so by filing a petition for revocation pursuant to Section 76.914 of the Commission's rules. 47 C.F.R. § 76.914.

III. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that the petition for reconsideration filed by C-TEC Cable Systems of Michigan, Inc. challenging the certification of Wayland Township, Michigan to regulate basic cable rates IS DENIED.

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[11] In its *First Order on Reconsideration* the Commission clarified its definition of "franchise area" for purposes of determining effective competition. *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, 9 FCC Rcd 1164, 1880 (1994) (*"First Recon. Order"*). Generally, "[a] franchise area is the area a system operator is granted authority to serve in its franchise." *Id.* at 1180. The Commission stated, however, that a more restricted definition of "franchise area" may be more appropriate under limited circumstances, such as when an operator "has itself, through its own conduct, self defined the areas to be served to such an extent that this redefined area accurately portrays the operator's 'franchise area.'" *Id.* at 1181. Under this standard, the franchising authority has the burden of showing that the operator has made an "affirmative decision . . . to restrict service." *Id.*

[12] The Township bases this household and subscriber data on information furnished for the Township by C-TEC.

[13] 47 C.F.R. § 76.906.

[14] 47 C.F.R. § 76.911(b)(1).

[15] Township of Wayland, Michigan Nonexclusive 1994 Cable Television Franchise With C-TEC Cable Systems of Michigan, Inc.

[16] *First Recon. Order*, at 1180.

[17] In light of our discussion regarding C-TEC's franchise agreement, we need not address the township's argument that C-TEC has redefined its franchise area.

8. IT IS FURTHER ORDERED that the automatic stay imposed by Section 76.911(c) of the Commission's Rules, as amended, 47 C.F.R. § 76.911(c) IS TERMINATED.

9. IT IS FURTHER ORDERED that C-TEC Cable Systems of Michigan, Inc. SHALL FILE the required rate justifications on the appropriate forms with Wayland Township, Michigan within thirty days of the release date of this *Memorandum Opinion and Order* or within thirty days of receipt of notice from the franchising authority that it is regulating C-TEC Cable Systems of Michigan, Inc.'s rates, whichever is later.

10. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 93-305

In the Matter of

Amendment of the Amateur
Service Rules to Implement
a Vanity Call Sign System.

REPORT AND ORDER

Adopted: December 23, 1994; Released: February 1, 1995

By the Commission:

I. INTRODUCTION

1. On December 13, 1993, we adopted a *Notice of Proposed Rule Making* (*Notice*)[1] in the above-captioned proceeding. In the *Notice*, we proposed to amend our rules to provide a system for the assignment of vanity call signs to amateur stations. This item adopts final rules implementing a vanity call sign system.

2. Each new amateur station licensed by the Commission is assigned a unique call sign.[2] An automated process selects the call sign according to our sequential call sign system.[3] Until recently, we have been unable to accommodate the many thousands of requests that we receive for call signs of the licensee's choice. One of our many steps in reinventing Government is to implement new licensing processing capabilities that make it practicable to grant such requests. To this end, we proposed a vanity call sign system, and asked for public comment on our proposal. We further proposed to use our increased capabilities to resume issuing new club and military recreation station licenses. We received one hundred and five timely comments and four timely reply comments. All of the comments have been carefully considered.

3. The comments confirm the ardent desire of many amateur operators to select the call signs for their stations and their willingness to pay a fee for this service. There were, moreover, several excellent improvements to the proposed system suggested. We hereby adopt rules for a vanity call sign system, incorporating several suggestions from the commenters as discussed below.

II. DISCUSSION

Fairness

4. A major concern of the amateur service community is that the system adopted for allocation of vanity call signs be fair and equitable. Specifically, many commenters suggest using a method of priority with respect to filing applications for vanity call signs.[4] The American Radio Relay League (ARRL) states that, in the interest of fairness and efficiency, the timing and priority in the filing of applications should be important facets of the system that we adopt.[5] The ARRL favors giving the first priority in applying for a call sign to the former holder or, where the holder is deceased, to a close relative.[6] Several commenters favor giving high priority to those who hold the higher classes of operator license.[7] Other commenters favor giving priority to those who have held their licenses the longest.[8]

5. The ARRL's suggested method is to open the system gradually through four "starting gates."[9] Gate One would allow a previous holder to apply for that call sign[10] or, where the holder is deceased, a close relative could apply. Gate Two would allow the 66,000 Amateur Extra Class operators, who have passed the most difficult license examinations, to apply. Gate Three would allow the 112,000 Advanced Class operators, who have passed the second most difficult license examinations, to apply. Gate Four would open the system to any licensee.[11] A club station license trustee would also be allowed to apply for the call sign of a deceased former holder.[12]

6. The suggestions regarding filing priority and fairness are persuasive. Given the strong interest in vanity call signs shown in the comments, it is obvious that the number of applications filed initially could be very large. We agree that a filing priority schedule would be helpful in maintaining fairness and efficiency during the initial implementation of the system, as well as ease administrative burdens on the Commission. The suggestions concerning giving the

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[1] 9 FCC Rcd 105 (1993)

[2] Section 97.119(a), 47 C.F.R. § 97.119(a), requires an amateur station to transmit its assigned call sign on its transmitting channel periodically for the purpose of making known, clearly, the source of the transmissions from the station to those receiving the transmissions.

[3] Our sequential call sign system is described in the FACT SHEET PR-5000 #206 *Amateur Station Call Sign Assignment System* dated June, 1991. A new call sign is sequentially selected from alphabetized regional-group listings for the licensee's operator class and mailing address. Each call sign has a one or two letter prefix and a one, two, or three letter suffix separated by a number indicating the geographic region. Some examples are: W1AA, N3AAA, AA5A, AB7AA, and KA9AAA. There are almost 15 million possible combinations of letters and numbers for amateur station call signs.

[4] For example, see comment of John Ward at 1, Dale Jones at 1 and 2, and Richard Bean at 1.

[5] Comments of ARRL at 4.

[6] Comments of ARRL at 7.

[7] There are six classes of amateur operator license. In order of examination difficulty they are, lowest to highest: Novice, Technician, Technician Plus, General, Advanced, and Amateur Extra. Comments of Michael C. and Nancy E. Bartlett at 1, Jim Monahan at 1, Ed Worst at 1, and Willard W. Wehe at 1.

[8] Dale Jones at 1, Michael Dinkelman at 1, and R. W. Le Massena at 1.

[9] Comments of ARRL at 6.

[10] Previous holder priority was also recommended by other commenters. Comments of Dale Jones at 1, Robert Philbrook at 1, Kirby Brown at 1, and Donald Murray at 1.

[11] As of May 31, 1994, there were 631,399 amateur stations licensed by the Commission.

[12] Reply comments of ARRL at 5.

highest filing priority to former holders and close relatives of deceased holders appear to be perceived as fair by the amateur service community generally, as does the giving of high priority to those who hold the higher classes of operator license.[13] Information on the class of operator license held by each amateur operator, moreover, resides in our licensee data base and lends itself to an automated process. Information on the length of time a person has been an amateur operator is not readily available, thus making that criterion impracticable to use as the basis of a filing priority schedule. Thus, after all amateur operators have been given an opportunity to obtain call signs that they, or deceased close relatives, formerly held, we will use operator license class as the basis for the filing priority schedule. In this regard, we are adopting the ARRL's suggested starting gates.

7. We will announce the opening of each gate by a Public Notice. The first gate will open as soon as our new FCC Form 610-V is available and our licensing facility is prepared to begin processing the applications. Gate One will open the system to the smallest group, *i.e.*, a few thousand prior holders and close relatives[14] of deceased prior holders. This phase will provide validation of our system procedures and alert us to any adjustments needed. We will then open the subsequent gates at such times as it is clear that the system is ready to accommodate more applications. We will also continue our sequential call sign system for new licensees and for those who do not want vanity call signs.

Assignable call signs

8. In the *Notice*, the system we proposed would require applicants to file a form, together with the required fee, with our fee collection contractor.[15] The applicants would request that their station licenses be modified to show vanity call signs. We further proposed that the applicant would list on the form a maximum of ten call signs in order of personal preference. After receiving the forms from our contractor, we would use an automated process to compare each applicant's list of preferred call signs with the list of call signs that are assignable at that time. The forms would be processed in the order they are received at the processor's work station. The first assignable call sign from the applicant's list would then be assigned to the station.

9. We requested comments on how the call signs that are already assigned could be made known to applicants so as to allow them to make prudent requests and thereby increase the probability that their requests can be granted. The ARRL states that private sector entities can easily provide applicants with lists of assignable call signs, but only after the initial surge of applications is completely processed. Until such time, even with starting gates, it foresees a very heavy demand for certain specific call signs so as to make it difficult for the applicant to determine which call signs are assignable. The ARRL suggests, therefore, that an applicant be permitted to submit a preferential list of twenty-five call signs, thus increasing the chances of requesting an assignable call sign.[16] We agree with ARRL that increasing the number of call signs that may be requested will reduce the number of unsuccessful applicants. We will allow, therefore, applicants to list up to twenty-five call signs in order of preference.

10. The ARRL prefers that an applicant be permitted to request only those call signs that are assignable to stations in the call sign region where the licensee resides.[17] We have carefully considered this suggestion. We have decided, however, not to impose that limitation. Otherwise, the applicant's choice of vanity call signs would be reduced to ten percent or less of the call signs that would otherwise be assignable to the station. A limitation based upon the person's place of residence, moreover, could easily be circumvented by using a mailing address in another call sign region.

11. We proposed that a call sign vacated by a licensee be made assignable immediately under the vanity call sign system. Several commenters, however, believe that a two-year period is necessary before a call sign again becomes assignable in order to avoid confusion in over-the-air station identification, to maintain accuracy in the licensee data base, and to accommodate QSL bureaus.[18] Further, they believe that it would preclude "trafficking in licenses" where a licensee, in exchange for some type of consideration, vacates a desirable call sign so that another licensee could immediately apply for it before its assignability becomes known generally. A two-year interval would, moreover, make the assignability of vacated call signs consistent with the assignability of a deceased person's station call sign, or a licensee's expired station call sign.[19] The comments are persuasive on this point. Therefore, the rules will reflect that a vacated call sign will not be assignable for a two-year waiting period.

Club stations

12. There was support in the comments for resumption of the issuance of new club station licenses.[20] In the *Notice*, we proposed that an applicant for a vanity call sign must be a current holder of a station license. The Hill Country Radio Club (Hill) suggests that applicants for new club station licenses be able to request a vanity call sign immediately, rather than having to wait and apply after they receive licenses. Hill considers a two-step procedure ponderous and unfair to new clubs that have been precluded from obtaining club licenses for many years.[21] The two-step process, however, is an administrative necessity because of the fee required for a vanity call sign. The application for a

[13] Comments of ARRL at 7, Michael C. and Nancy E. Bartlett at 1, Jim Monahan at 1, Ed Worst at 1, and Willard W. Wehe at 1.

[14] We define close relatives as the spouse, child, grandchild, stepchild, parent, grandparent, stepparent, brother, sister, stepbrother, stepsister, aunt, uncle, niece, nephew, or in-law of the deceased.

[15] The current contractor is the Mellon Bank. It accepts applications in Pittsburgh, Pennsylvania.

[16] Comments of ARRL at 3 and 4.

[17] Comments of ARRL at 10.

[18] A *QSL bureau* is an organization that facilitates the exchange of confirmation cards between amateur operators whose stations have communicated with each other.

[19] Comments of Thomas Johnston at 1, ARRL at 9, Stephan Sacco, Jr. at 2, and James Price at 2.

[20] Comments of Metropolitan Amateur Radio Club at 1 and Portland Amateur Radio Club at 3.

[21] Comments of The Hill Country Amateur Radio Club at 1 and 2.

vanity call sign is the only amateur service application that must be filed with our fee collection contractor.[22] Persons not already holding a club station license, therefore, must first apply for and receive a license before they can file an application with the fee collection contractor requesting that the license be modified to show a vanity call sign. However, we will begin accepting applications[23] for club and military recreation station licenses on the date this *Report and Order* becomes effective. In many cases, therefore, the license trustee will be able to obtain a license document and thus will be eligible to apply for a vanity call sign for the club station when the starting gate for his or her class of operator license opens. The final gate will also allow a club station licensee trustee to apply for the call sign of a deceased former holder. The license trustee must obtain a written consent from a close relative of the deceased.

Special event stations

13. The ARRL requests that specific call signs in a unique call sign block be made assignable only to certain special event stations,[24] and suggests the one-by-one call sign block for this purpose.[25] The ARRL states that such specific call signs should be reserved for assignment to stations operating in conjunctionwith short term special events of national significance.[26] A special event vanity call sign system may meet the needs of amateur operators for temporary operation of their stations during events that are of special significance to the amateur service community. We will, therefore, set aside the one-by-one call sign block until the matter can be addressed in a separate proceeding.

Filing procedures

14. In our *Notice*, we asked for comments concerning alternative ways, such as magnetic computer disks, that applicants could use to apply directly to the Commission for a vanity call sign. Several ways were suggested.[27] One commenter suggests a procedure where applicants would file the application form by facsimile and provide a credit card number. His second suggestion is an electronic on-line filing procedure where the applicant answers a series of questions to search the Commission's data base for an assignable call sign. If the call sign is assignable, the applicant would file an application form after paying the fee by credit card. The Commission's printed acknowledgment of the transaction would constitute a temporary license.[28] These suggestions were helpful and we will investigate these ideas for possible future use.

15. Some commenters believe that the fee charged for a vanity call sign should be charged on a one-time basis only, and that no fee should be required when the license is renewed.[29] The ARRL believes that a one-time fee is more appropriate because the Commission's additional workload occurs at the time of the initial processing of the vanity call sign.[30] Section 9(g) of the Communications Act of 1934, as amended, currently provides for the payment of an annual fee of $7.00 for an amateur station vanity call sign. Because the normal term of an amateur station license is ten years, a fee of $70.00 will have to be paid when requesting a new or renewed vanity call sign. At this time, under the Communications Act, we cannot provide a one-time fee for processing vanity call sign applications.

III. CONCLUSION

16. We have decided to offer a vanity call sign system to the amateur service community, in recognition of the strong sense of identity among amateur operators that is grounded in the call signs of their stations. We have also decided to resume issuing new club and military recreation station licenses. We see these actions as fundamental to our commitment to put the needs of people first in providing the services that they want. We are pleased to be able make this new system available to the amateur community. Therefore, we amend the amateur service rules to implement a vanity call sign system as set forth in the attached Appendix.

IV. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED that effective **March 24, 1995**, Part 97 of the Commission's Rules, 47 C.F.R. Part 97, IS AMENDED as set forth in the Appendix hereto. Authority for this action is found in Section 4(i) and 303(r)of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r).

18. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

19. For further information, contact Maurice J. DePont, Wireless Telecommunications Bureau, 202-418-0690.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

Part 97 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

Part 97 - Amateur Radio Service

1. The authority citation for Part 97 continues to read as follows:

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[22] Applications for licenses involving examinations are filed with the local volunteer examiners who forward them through a coordinator to the Commission. All other amateur service license applications are filed directly with the Commission.

[23] FCC Form 610-B must be used when applying for a club or military recreation station license.

[24] Comments of ARRL at 11 and 12.

[25] A one-by-one call sign consists of a single prefix letter (K, N, or W), the region number (0/ to 9), and a single suffix letter (A to Z). There are 780 such call signs. They are not assigned under the sequential call sign system.

[26] Comment of ARRL at 12.

[27] *See*, for example, the comments of Ed Worst at 1.

[28] Comments of Steven R. Kelly at 1 and 2.

[29] Comments of Francis Vangeli at 1, John Chandler at 1, Ross Patterson at 1, and ARRL at 11.

[30] Comments of ARRL at 11.

Authority citation: 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. §§ 151-155, 301-609, unless otherwise noted.

2. Section 97.3 is amended by redesignating paragraphs (a)(11) through (a)(45) as paragraphs (a)(12) through (a)(46) and adding new paragraph (a)(11) to read as follows:

§ 97.3 Definitions

(a) ***

(11) *Call sign system.* The method used to select a call sign for amateur station over-the-air identification purposes. The call sign systems are:

(i) *Sequential call sign system.* The call sign is selected by the FCC from an alphabetized list corresponding to the geographic region of the licensee's mailing address and operator class. The call sign is shown on the license. The FCC will issue public announcements detailing the procedures of the sequential call sign system.

(ii) *Vanity call sign system.* The call sign is selected by the FCC from a list of call signs requested by the licensee. The call sign is shown on the license. The FCC will issue public announcements detailing the procedures of the vanity call sign system.

* * * * *

3. Section 97.17(f) is amended by revising paragraph (f) and adding paragraph (h) to read as follows:

§ 97.17 Application for new license or reciprocal permit for alien amateur licensee.

* * * * *

(f) One unique call sign will be shown on the license of each new primary, club, and military recreation station. The call sign will be selected by the sequential call sign system. h)

* * * * *

(h) Each application for a new club or military recreation station license must be submitted to the FCC, 1270 Fairfield Road, Gettysburg, PA 17325-7245. No new license for a RACES station will be issued.

4. Section 97.19 is added to read as follows:

§ 97.19 Application for a vanity call sign.

(a) A person who has been granted an operator/primary station license or a license trustee who has been granted a club station license is eligible to make application for modification of the license, or the renewal thereof, to show a call sign selected by the vanity call sign system. RACES and military recreation stations are not eligible for a vanity call sign.

(b) Each application for a modification of an operator/primary or club station license, or the renewal thereof, to show a call sign selected by the vanity call sign system must be made on FCC Form 610-V. The form must be submitted with the proper fee to the address specified in the Private Radio Services Fee Filing Guide.

(c) Only unassigned call signs that are available to the sequential call sign system are available to the vanity call sign system with the following exceptions:

(1) A call sign shown on an expired license is not available to the vanity call sign system for 2 years following the expiration of the license.

(2) A call sign shown on a surrendered, revoked, set aside, cancelled, or voided license is not available to the vanity call sign system for 2 years following the date such action is taken.

(3) Except for an applicant who is the spouse, child, grandchild, stepchild, parent, grandparent, stepparent, brother, sister, stepbrother, stepsister, aunt, uncle, niece, nephew, or in-law, and except for an applicant who is a club station license trustee acting with the written consent of at least one relative, as listed above, of a person now deceased, the call sign shown on the license of a person now deceased is not available to the vanity call sign system for 2 years following the person's death, or for 2 years following the expiration of the license, whichever is sooner.

(d) Except for an applicant who is the spouse, child, grandchild, stepchild, parent , grandparent, stepparent, brother, sister, stepbrother, stepsister, aunt, uncle, niece, nephew, or in-law, and except for an applicant who is a club station license trustee acting with the written consent of at least one relative, as listed above, of a person now deceased who had been grantedh) the license showing the call sign requested, the vanity call sign requested by an applicant must be selected from the groups of call signs designated under the sequential call sign system for the class of operator license held by the applicant or for a lower class.

(1) The applicant must request that the call sign shown on the current license be vacated and provide a list of up to 25 call signs in order of preference.

(2) The first assignable call sign from the applicant's list will be shown on the license grant. When none of those call signs are assignable, the call sign vacated by the applicant will be shown on the license grant.

(3) Vanity call signs will be selected from those call signs assignable at the time the application is processed by the FCC.

5. Section 97.21(a)(3) is revised to read as follows:

§ 97.21 Application for a modified or renewed license.

(a) ***

(3) May apply for renewal of the license for another term. (The FCC may mail to the licensee an FCC Form 610-R that may be used for this purpose.)

(i) When the license does not show a call sign selected by the vanity call sign system, the application may be made on FCC Form 610-R if it is received from the FCC. If the Form 610-R is not received from the FCC within 30 days of the expiration date of the license for an operator/primary station license, the application may be made on FCC Form 610. For a club, military recreation, or

RACES station license, the application may be made on FCC Form 610-B. The application may be submitted no more than 90 days before its expiration to: FCC, 1270 Fairfield Road, Gettysburg, PA 17325-7245. When the application for renewal of the license has been received by the FCC at 1270 Fairfield Road, Gettysburg, PA 17325-7245 prior to the license expiration date, the license operating authority is continued until the final disposition of the application.

(ii) When the license shows a call sign selected by the vanity call sign system, the application must be filed as specified in Section 97.19(b).

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMSAT Corporation

For authority pursuant to Section 214 of the Communications Act of 1934, as amended to establish channels of communications for the purpose of providing space segment services between the United States and overseas points. I-T-C-94-351

ORDER AND AUTHORIZATION

Adopted: December 27, 1994; Released: February 1, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned, uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-351 of COMSAT Corporation (COMSAT) IS GRANTED and COMSAT is authorized to establish channels of communication for the provision of authorized services between the United States on the one hand and all earth stations in the overseas points listed in the Appendix hereto via INTLESAT Atlantic and Pacific Ocean region satellites.

3. IT IS FURTHER ORDERED that COMSAT shall provide appropriate space segment capacity via INTELSAT satellites located at 325.5^0, 329^0, 332.5^0 and 335.5^0 east longitude to any U.S. carrier authorized by the Commission to acquire such capacity from COMSAT for the provision of public switched voice and data and private line telecommunications services between the United States and Cuba as provided in *COMSAT Corporation*, 9 FCC Rcd 4037 (Int. Fac. Div. 1994).

4. IT IS FURTHER ORDERED that COMSAT is authorized to provide VSAT Service between the United States mainland and Puerto Rico, and between the United States mainland and the United States Virgin Islands, on an incidental basis and as part of an integrated international VSAT network as specified in *Communications Satellite Corporation*, 8 FCC Rcd 1578 (Int. Fac. Div 1993), or as otherwise specifically authorized by the Commission.

5. IT IS FURTHER ORDERED that the Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

6. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

APPENDIX

Afghanistan
Albania
Algeria
American Samoa
Angola
Anguilla
Antarctica
Antigua
Argentina
Armenia
Aruba
Ascension Island
Australia
Azerbaijan
Azores
Bahamas
Bahrain
Bangladesh
Barbados
Barbuda
Belarus
Belgium
Belize
Benin
Bermuda
Bhutan
Bolivia
Bonaire
Bosnia
Botswana
Brazil
Brunei
Bulgaria
Burkina Faso
Burma
Burundi
Cambodia
Cameroon
Canada
Canary Islands
Cape Verde
Cayman Islands
Central African Rep.
Chad
Chile
China (Peoples Rep. of)
Christmas Is.
Colombia
Comoros
Congo
Cook Island
Costa Rica
Cote d'Ivoire
Croatia
Cuba
Curacao
Cyprus
Czech Rep.
Denmark
Diego Garcia
Dijibouti
Dominican Republic
Ebeye
Ecuador
Egypt
El Salvador
Equatorial Guinea
Eritrea
Estonia
Ethiopia
Falkland Island
Fiji Islands
Finland
France
French Guiana
French Martinique
French New Caledonia
French Polynesia
French New Caledonia
Gabon
Gambia
Georgia
Germany
Ghana
Gibraltar
Greece
Grenada
Guadeloupe
Guam
Guatemala
Guinea
Guinea Bissau
Guyana
Haiti
Honduras
Hong Kong
Hungary
Iceland
India
Indonesia
Iran
Iraq
Ireland
Israel
Italy
Jamaica
Japan
Jordan
Kazakhstan
Kenya
Kiribati
Republic of Korea
Kosrae
Kuwait
Kyrgyzstan
Lao PDR
Latvia
Lebanon
Lesotho
Liberia
Libya
Liechtenstein
Lithuania
Luxembourg
Macao
Macedonia
Madagascar
Majuro
Malagasy Rep.
Malawi
Malaysia
Maldives
Mali
Malta
Mariana Is.
Marshall Islands
Martinique
Mauritania
Mauritius
Mexico
Micronesia
Midway
Moldava
Monaco
Mongolia
Montserrat
Morocco
Mozambique
Namibia

Nauru
Nepal
Netherlands
New Caledonia
New Zealand
Nicaragua
Niger
Nigeria
Norway
Oman
Pakistan
Palau
Panama
Papua New Guinea
Paraguay
Peru
Philippines
Poland
Ponape
Portugal
Puerto Rico
Qatar
Romania
Russian Fed.
Rwanda
Saipan
San Marino
Sao Tome & Principe
Saudi Arabia
Senegal
Serbia and Montenegro
Seychelles
Sierra Leone
Singapore
Slovak Republic
Slovenia
Solomon Is.
Somalia
South Africa
Spain
Sri Lanka
St. Kitts-Nevis
St. Lucia
St. Martin
St. Vincent & the Grenadines
Sudan
Suriname
Swaziland
Sweden
Switzerland
Syria
Taiwan
Tajikistan
Tanzania
Thailand
Togo
Tongo
Trinidad & Tobago
Truk
Tunisia
Turkey
Turkmenistan
Turks Caicos Isles
Tuvalu
Uganda
Ukraine
United Arab Emirates
United Kimgdom
Uruguay
Uzbekistan
Vanuatu
Vatican City
Venezuela
Vietnam
Virgin Is. (British)
Virgin Is. (U.S.)
Wake
Western Samoa
Yap
Yemen
Zaire
Zambia
Zimbabwe

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 1, 1995

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON NECA'S 1995 PROPOSED MODIFICATIONS TO THE INTERSTATE AVERAGE SCHEDULE FORMULAS AAD 95-2

Comment Date: March 1, 1995
Reply Date: March 15, 1995

On December 30, 1994, the National Exchange Carrier Association, Inc. ("NECA") filed modifications to the average schedule formulas that NECA proposes become effective July 1, 1995. These interstate average schedule formulas compensate more than six hundred local exchange carriers for the use of their facilities in originating and terminating interstate common carrier communications.

NECA states that "the cumulative net effect of the formula changes, based on fixed demand units, would result in a general increase in average schedule payments of about 0.3 percent. More specifically, Common Line settlements are expected to decrease by 2.0% while Traffic Sensitive settlements are expected to increase by 2.0%. The net effect is not zero because Traffic Sensitive settlements constitute a larger portion of total average schedule settlements."

NECA further states that the proposed revisions are based on cost and demand data taken from a statistical sample of 203 average schedule companies and 195 cost companies. NECA states that smaller average schedule companies (these are companies with fewer than 10,000 lines that represent 93% of all average schedule carriers) will generally experience settlement increases per unit while larger average schedule companies are expected to experience small settlement decreases per unit. NECA further states that changes in the formulas reflect cost growth, access demand growth, new allocation methods for line haul costs, the introduction of a tariff rate index term to the special access formula, and a revenue requirement adjustment to recover regulatory fees imposed by the Commission.

NECA also states that "if approved, the proposed formulas will produce settlements during the test period (July 1, 1995 through June 30, 1996) that simulate disbursements that would be received by a cost company that is representative of average schedule companies, as required by section 69.606(a) of the Commission's rules." Finally, NECA states that it will provide each average schedule company with information and work sheets necessary to estimate individual impacts of the proposed revisions.

Parties may file comments concerning NECA's average schedule modifications no later than **March 1, 1995**. Reply comments should be filed by **March 15, 1995**. All pleadings should reference AAD 95-2. An original and five (5) copies of each pleading should be sent to the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C., 20554. Copies of the pleading should also be sent to Bob Hall, Rafi Mohammed and Adrian Wright, Cost Analysis Branch, Accounting and Audits Division, Common Carrier Bureau, Room 812, 2000 L Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C., 20037. Copies of the pleadings are available for inspection and copying in the Accounting and Audits Division's public reference room at the 2000 L Street address shown above. Copies are also available from ITS, Inc. at 202/857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§ 1.1200-1.1216. For further information contact Bob Hall, Rafi Mohammed or Adrian Wright, Cost Analysis Branch, Accounting and Audits Division, Common Carrier Bureau, at (202) 418-0830.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Greater Dayton	CSR-4168-M
Public Television against	CSR-4169-M
TCI Cablevision of Ohio	CSR-4170-M
	CSR-4171-M
Request for Carriage and	CSR-4172-M
Channel Positioning	

MEMORANDUM OPINION AND ORDER

Adopted: January 19, 1995; Released: February 1, 1995

By the Cable Services Bureau:

INTRODUCTION

1. On October 5, 1992, the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act) became law.[1] On December 4, 1992 the 1992 Cable Act's requirements for mandatory carriage of noncommercial educational (NCE) stations set forth in Section 5 of the 1992 Act became effective.[2] On December 10, 1993 Greater Dayton Public Television (GDPT), licensee of station WPTO (Educ., Channel 14), Oxford, Ohio filed five complaints seeking to ensure WPTO's carriage on channel 14 of TCI Cablevision of Ohio, Inc.'s (TCI) system serving Golf Manor, Middletown, Wilmington, Fairfield, and Hamilton.[3] On January 11, 1994, TCI filed a consolidated opposition to these complaints. GDPT filed a reply to this opposition on February 14, 1994.

SUMMARY OF PLEADINGS

2. WPTO maintains that, despite its status as a qualified, local NCE broadcast station,[4] TCI refuses to honor WPTO's channel-election. Pursuant to the Commission's must-carry rules, a qualified NCE is entitled to carriage on the cable operator's system and may choose a channel position based on either its on-air channel or the channel on which it was carried as of July 19, 1985.[5] WPTO has elected its on-air channel, channel 14, as its channel position on respondent's systems.

3. TCI does not dispute that WPTO is a qualified NCE entitled to carriage on its systems, nor does respondent dispute that, ordinarily, WPTO would be entitled to elect a channel based on its on-air channel. However, respondent contends that to locate WPTO on channel 14 would require TCI to switch one of its pay services to another channel. To effectuate complainant's request would also, according to TCI, require the removal and retrapping of positive and negative traps of almost 27,000 subscribers. The estimated cost of this effort is $307,000. TCI acknowledges that the Commission has stated that "inconvenience, marketing problems, the need to reconfigure the basic tier or the need to employ additional traps or make technical changes" are not enough to bar fulfillment of an operator's must-carry obligations;[6] nonetheless, TCI believes that to require compliance in this instance is well-beyond what the Commission envisioned and thus WPTO's request should be denied.

4. TCI states that it offered to carry WPTO on channel 15 and that "it makes no sense to spend over $300,000 to move WPTO a mere *one* channel down the television dial."[7] Respondent states that complainant also refused its offer to educate viewers about an alternative channel position, and that WPTO has failed to explain why placement on channel 15 or channel 4 (which TCI allegedly offered as a second alternative) is significantly different than channel 14.[8]

5. TCI concludes by requesting that, if WPTO's complaint is granted, respondent be given twelve (12) weeks beyond the standard 45 days in which to comply.[9] TCI bases this request on its estimates regarding the number of traps that can be produced per week and the installation time. WPTO requests that the Commission reject this extension of time.

DISCUSSION

6. We find that TCI is required to carry WPTO on channel 14. Section 615(g)(5) of the 1992 Cable Act permits a NCE to elect its over-the-air channel number as its channel position on a cable system,[10] and WPTO has prop-

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] 47 U.S.C. § 535. *Compare with Turner Broadcasting System, Inc. v. Federal Communications Commission*, 114 S. Ct. 2445 (1994). In remanding the case, the Court determined that issues of material fact must be resolved by the lower court. Specifically, the Court indicated that the government must show that the must-carry provisions are necessary to alleviate the alleged harms and that they do not burden substantially more speech than necessary to further such protection. *Id.* at 2451.

[3] All these communities are located in Ohio.

[4] 47 C.F.R. § 76.55(a), (b); § 76.56(a).

[5] 47. C.F.R. § 76.57(b).

[6] *Report and Order in MM Docket No. 92-259*, 8 FCC Rcd 2965, 2988 para. 91 (1993).

[7] Consolidated Opposition to Channel Positioning Complaints, p.4.

[8] TCI considers WPTO's channel request unreasonable given that complainant "has failed to adequately explain why it believes placement on channel 4 [another channel option] or on channel 15 will cause great harm or provide 'inadequate visibility' for the station... In any event, WPTO's concerns are vastly overstated...[and] since carriage of WPTO began only this summer, the Station has no historical linkage to cable channel 14. Moreover, as already explained, TCI has offered to work with WPTO in developing a promotional package which would educate subscribers about WPTO's cable channel position." Consolidated Opposition To Channel Positioning Complaints, p. 5. WPTO contends that it never "volunteered an alternative placement on cable channel 4...[and that] all urban cable operators in the Dayton and Cincinnati markets have agreed to and carry WPTO on channel 14". Consolidated Reply to Consolidated Opposition to Channel Positioning Complaints, p. 3. Thus, to place WPTO on a channel other than channel 14--"without appropriate promotional support"--would cause further harm to WPTO. *Id.* at 5. WPTO considers TCI's offer of promotional support to be minimal. *Id.* at 2.

[9] 47 C.F.R. § 76.61(b)(2).

[10] *Supra* note 5.

erly chosen its over-the-air channel. There is no requirement in the Act or our rules that a broadcaster explain why the operator's on-channel preference is less suitable than the broadcaster's stautorily-based channel election. Further, cable operators must comply with the channel positioning requirements absent a compelling technical reason.[11] The Commission specifically held that the need to replace traps, or to reconfigure the basic tier, or to make technological changes are generally not grounds for waiver. Nevertheless, in adopting the on-channel carriage rules, the Commission recognized that there well might be certain circumstances where the compliance costs incurred by a cable operator would be so compelling as to warrant a waiver. To obtain such a waiver, a petitioner must first submit detailed evidence demonstrating the compliance costs. The petitioner must then demonstrate how such costs would substantially impact the cable system. TCI has failed to make these necessary showing.

7. Accordingly, the petition filed on December 8, 1993, by Greater Dayton Public Television IS GRANTED, in accordance with Section 615(g)(5) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and TCI Cablevision of Ohio, Inc. IS ORDERED to commence carriage of WPTO on cable channel 14 in accordance with the above decision twelve weeks (12) from the release date of this *Order*.

8. This action is taken authority delegated by Section 0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[11] *Supra* note 6.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Pikes Peak Broadcasting Company against Ouray Cablevision — CSR-4117-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: January 19, 1995; Released: February 1, 1995

By the Cable Services Bureau:

INTRODUCTION

1. On October 5, 1992, the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act) became law.[1] On March 11, 1993, the Commission adopted a *Report and Order* to implement mandatory broadcast signal carriage ("must-carry") provisions of the Cable Act.[2] Pursuant to the rules adopted in the *Report and Order*, cable systems were required to commence carriage of local broadcast stations entitled to must-carry status beginning June 2, 1993.[3] On June 17, 1993, local broadcast stations were required to make their initial election of either must-carry or retransmission consent status and notify cable systems of their election.[4] Those broadcast stations which elected must-carry status were required to notify the cable system of their preferred channel position at that time.[5]

SUMMARY OF PLEADINGS

2. On October 4, 1993, Pikes Peak Broadcasting Company (Pikes Peak), licensee of broadcast station KJCT-TV (KJCT), filed a complaint against Ouray Cablevision (Cablevision) for the latter's failure to comply with the Commission's must-carry rules and the 1992 Cable Act.

3. In its complaint, Pikes Peak stated that KJCT is the only ABC affiliate in the Grand Junction-Durango Area of Dominant Influence (ADI), and has been on the air since 1979. According to complainant, on June 15, 1993, it notified Cablevision that it wished to be carried pursuant to must-carry. Cablevision responded almost two months later stating that it believed itself to be outside of KJCT's ADI, and that the broadcast station delivered a poor quality signal. Cablevision also stated that it would continue to carry the Denver ABC affiliate even though, according to Pikes Peak, the Denver affiliate is not in the ADI that encompasses Ouray.[6]

4. Pikes Peak responded to Cablevision by including documentation that it believes proves that KJCT and Cablevision's Ouray systems are both within the same ADI. Additionally, complainant says that Cablevision offered no evidence to support its charge that KJCT delivered a poor quality signal. Pikes Peak notes that a test performed earlier that year indicated that the requisite signal was delivered.[7]

5. According to complainant, Cablevision's next response stated that while it wanted to carry KJCT it could not afford the necessary equipment. However, this correspondence did not elaborate on why or what type of equipment was necessary for carriage. Cablevision did not file in opposition to Pike Peak's complaint.[8]

DISCUSSION

6. We find that KJCT and the Ouray cable system are located in the same ADI and that the station is entitled to the cable carriage it seeks. Since no other pleadings have been filed in this matter, the complaint filed on October 4, 1993 by Pikes Peak Broadcasting Company IS GRANTED, in accordance with §614 (d)(3) (47 U.S.C. 534) of the Communications Act of 1934, as amended, and Ouray Cablevision IS ORDERED to commence carriage of Station KJCT-TV, forty-five (45) days from the release of this *ORDER*.

7. This action is taken pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] *Report and Order* in MM Docket 92-259, 8 FCC Rcd 2965 (1993). *See also, Clarification Order*, 58 FR 32449 (June 10, 1993).

[3] 47 C.F.R. § 76.56(a),(b).

[4] 47 C.F.R. § 76.64(f)(1).

[5] 47 C.F.R. § 76.57(d).

[6] Pikes Peak states that the Denver affiliate is 180 miles away.

[7] "On April 8, 1993, Pikes Peak's engineer went to Ouray and performed a test. The test location was approximately 200 yards north of Cablevision's headend. Using a Tektronix 2710 spectrum analyzer in the 75 ohm mode (last calibrated on March 10, 1993), a Radio Shack V-110 VHF antenna with 20 feet of RG-11 cable, and portable color monitor, the engineer obtained a reading of 25.9 dbmv. This converted to -23 dbm. The picture on the monitor was clear and the audio was clean." *Complaint* at page 3.

[8] The city of Ouray filed a statement in which it felt that Ouray's only industry, tourism, would be better served by carriage of the Denver ABC affiliate (because of its state-wide and national programming) rather than KJCT's regional programming. The city feels that to require carriage of KJCT would be "forcing KJCT-TV down our throats". This claim is not relevant for consideration of this complaint. However, we note that the 1992 Cable Act and our implementing rules provide procedures for modifying television markets for must-carry purposes to better reflect marketplace conditions. *See* 47 U.S.C. § 534(h)(1)(C) and 47 C.F.R. § 76.59.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Fouce Amusement Enterprises, Inc. against Community Cablevision Company	CSR-4135-M CA0060

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: January 19, 1995; Released: February 1, 1995

By the Chief, Cable Services Bureau:

INTRODUCTION

1. On October 5, 1992, the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act) became law.[1] On March 11, 1993, the Commission adopted a *Report and Order* to implement mandatory broadcast signal carriage ("must-carry") provisions of the Cable Act.[2] Pursuant to the rules adopted in the *Report and Order*, cable systems were required to commence carriage of local broadcast stations entitled to must-carry status beginning June 2, 1993.[3] On June 17, 1993, local broadcast stations were required to make their initial election of either must-carry or retransmission consent status and notify cable systems of their election.[4] Those broadcast stations which elected must-carry status were required to notify the cable system of their preferred channel position at that time.[5]

SUMMARY OF PLEADINGS

2. On October 13, 1993, Fouce Amusement Enterprises, Inc. (Fouce), licensee of KRCA-TV (KRCA) filed a complaint against Community Cablevision Company, d/b/a Dimension Cable Services (Dimension), for the latter's failure to comply with the channel positioning requirements of the Commission's Rules and the 1992 Cable Act.

3. According to the complaint, on April 13, 1993, KRCA notified Dimension that it was requesting carriage pursuant to must-carry. On August 17, 1993, after the two parties reached an agreement regarding compensation for copyright liability, Dimension agreed to carry KRCA. Additionally, Dimension informed KRCA that it was rebuilding its system in order to expand channel capacity, and that KRCA would only be carried in the rebuilt areas. However, Dimension assured KRCA that once the rebuild was completed the station would be available to all of Dimension's subscribers. Subscribers in the rebuilt portion of Dimension's system are able to access 56 channels while those in the older portion are able to access 40 channels.

4. Fouce argues that Section 76.56(d)(1) of our Rules requires that a broadcast station carried in fulfillment of a cable operator's must-carry obligations must be made available to every subscriber of that system. Thus, according to Fouce, KRCA must be carried on the old as well as the new portions of the system.

5. Dimension responds by contending that its must-carry requirement is not based on a 56-channel system. Dimension cites our statement that "if a portion of a cable system has insufficient wiring or microwave capacity to receive the full complement of channels available at the system's principal headend, we will not require the cable operator to upgrade that part of the system".[6] According to Dimension, this statement clearly indicates that where different parts of a cable system have differing channel capacities the number of channels devoted to must-carry may also differ relative to the respective channel capacities of the system. Dimension contends that by already carrying 13 broadcast stations--9 by must-carry, 4 by retransmission consent--on the 40 channel segment of its system, and thus having satisfied its must-carry obligations with regard to this portion of the system, to accept KRCA's reasoning is to require that the 40 channel segment be upgraded. Simply, Dimension believes that it is not required to treat its entire system as having 56 channels for purposes of determining its system-wide must-carry obligations. Dimension finds no indication from our Rules or the legislative history that the "moment an operator rebuilds a portion of its system, thereby potentially increasing its must-carry quota for that portion, that all the system's other subscribers, including those in the unrebuilt areas, must be provided with every must-carry station carried anywhere on the system."

6. KRCA responds that it is not requesting that we require Dimension to complete its upgrade, just that Dimension make KRCA available to all its subscribers. KRCA also believes that since the must-carry quota is based on the number of activated channels, and since Dimension admits that its system has 56 channels engineered at its headend, Dimension's must-carry quota consists of 19 rather than 13 channels. KRCA further contends that Dimension has not shown that any of its subscribers have "insufficient wiring or microwave capacity" to receive all 56 channels. Further, complainant cites to *Complaint of WLIG-TV, Inc. against Cablevision Systems Corporation*, CSR-3903-M (Nov. 10, 1993) as evidence that its position is correct. KRCA argues that in *WLIG* the "Commission directed a cable operator to provide a must-carry signal to all of its subscribers, over the argument of the operator that it would have insufficient channel capacity to do so on the portions of its system in which it would not complete a system rebuild until early 1994." In *WLIG*, the complainant was carried on channel 37 and inaccessible to subscribers who had been provided with only 36-channel converters. KRCA noted that even though the Commission had previously stated that it would not require cable operators to provide converter boxes to subscribers so that they

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).
[2] *Report and Order* in MM Docket 92-259, 8 FCC Rcd 2965 (1993). *See also, Clarification Order*, 58 FR 32449 (June 10, 1993).
[3] 47 C.F.R. § 76.56(a),(b).
[4] 47 C.F.R. § 76.64(f)(1).
[5] 47 C.F.R. § 76.57(d).
[6] *Report and Order*, 8 FCC Rcd at 2969, ¶ 13, n.38.

would be able to receive broadcast signals, it nonetheless ruled that it would be in the public's interest to require the cable operator to move WLIG to a channel viewable by all subscribers.

7. In its final reply to KRCA, Dimension distinguished *WLIG* by noting that *WLIG*, unlike the present complaint, "addressed the issue of a cable operator's obligations with respect to a signal *within* the system's must carry quota... The cable operator did not contend... as Dimension does here, that carriage of the signal was not required in non-upgraded areas because the system had already met its signal carriage quota."

DISCUSSION

8. We conclude that Dimension is not required to make KRCA available to all of its subscribers prior to completion of its rebuild. Section 76.56(d)(1), the core of KRCA's argument, states that "Local commercial television stations carried in fulfillment of the requirements of this section shall be provided to every subscriber of a cable system." Additionally, we note that Section 76.56(b)(2) states that "A cable system with more than 12 useable activated channels, as defined in Section 76.5(oo), shall carry local commercial television stations up to one-third of the aggregate number of useable activated channels of such system." Ordinarily, these two sections are not seen as conflicting or contradictory. Here, however, the juxtaposition of these two provisions requires that we decide which part of Dimension's system determines its system-wide must-carry obligation: the older 40 channel portion, the new 56 channel portion, or may there be separate requirements for each portion?

9. Even though a broadcast station may qualify for carriage pursuant to the must-carry rules there is no requirement that every eligible station ultimately be carried. For example, the one-third requirement which applies to systems the size of Dimension (setting aside, for the moment, its bifurcation) clearly sets a limit on the number of eligible stations that would have to be carried by any one cable system pursuant to must-carry. Similarly, our Rules state "Whenever the number of local commercial television stations exceeds the maximum number of signals a cable system is required to carry under... this section, the cable operator shall have discretion in selecting which such stations shall be carried on its cable system,...."[7] Thus, not every station that qualifies for must-carry has an absolute right to carriage. If Dimension's entire system only consisted of 40 channels, KRCA could be carried--but "at the discretion of [Dimension], subject to retransmission consent...."[8]

10. The controversy here concerns which portion of Dimension's system should be used to calculate its must-carry obligation. We could require use of the 40 channel portion, the 56 channel portion, or mandate different requirements for different portions of the system. Obviously, making the 40 channel portion determinative would potentially allow for the harmful result of removing channels otherwise guaranteed carriage on the 56 channel portion of the system; and to use the 56 channel portion as controlling implicates the point raised by Dimension: we would then be requiring Dimension exceed the number of signals ordinarily required to be carried or to upgrade its system. Therefore, we conclude that the best option is one that maintains the present arrangement: KRCA carried on the upgraded portion of the system, but not required to be placed on the old portion until the rebuild is completed.

11. We reach this conclusion principally because KRCA is beyond the scope of Dimension's must-carry obligations, i.e. Dimension currently carries its maximum number of must-carry stations on the 40 channel segment. In *WLIG* we did require the cable operator to switch the broadcast station to a channel receivable by all subscribers, but *WLIG* concerned a cable operator's obligations with respect to a signal *within* its cable system's must-carry quota. KRCA, however, is outside of Dimension's must-carry obligations on the 40 channel segment, thus we have no basis for mandating its carriage on this portion of the system. KRCA has offered no evidence challenging Dimension's claim that carriage of the 13 channels satisfies Dimension's must-carry obligation; nor has complainant suggested that its rightful place is within Dimension's first thirteen must-carry stations. Simply because KRCA *could have been* carried pursuant to must-carry on the 40 channel portion is no reason for us to expand the obligations of the older segment of the system where all the must-carry slots have been taken.

12. Accordingly, the petition filed on October 13, 1993, by Fouce Amusement Enterprises, Inc. IS DENIED, in accordance with Section 614(b)(B) (47 U.S.C. § 534) of the Communications Act of 1934, as amended.

13. This action is taken by the Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

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[7] §76.56 (b)(4). Also, "A cable operator is not required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station that is carried on its cable system, or to carry the signals of more than one local commercial television station affiliated with a particular broadcast network...." §76.56(b)(5).

[8] *Report and Order*, 8 FCC Rcd at 2972.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Pray, Inc. against	CSR-4196-M
Nationwide Communications, Inc.	TX2060 et al.

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: January 20, 1995; Released: February 2, 1995

By the Cable Services Bureau:

INTRODUCTION

1. On December 16, 1993, Pray, Inc.,[1] licensee of Television Broadcast Station KRTW (Ind., Channel 57), Baytown, Texas, filed a "Complaint," pursuant to 47 U.S.C. 614(d)(3) seeking carriage of the signal of its station by Nationwide Communications, Inc. d/b/a EagleVision, described as "the operator of a large number of CATV and SMATV systems in and around Houston, Texas." An "Opposition To Complaint" was filed February 15, 1994, by Nationwide Communications, Inc. KRTW replied to this opposition on March 2, 1994.

SUMMARY OF PLEADINGS

2. KRTW states that it places a predicted city grade contour over virtually all of Houston, which is approximately twenty-four miles west of Baytown. Both Houston and Baytown are located in Harris County, and Baytown is in Houston's area of dominant influence (or "ADI"). However despite numerous requests, both verbal and written, EagleVision has not added KRTW to its systems, claiming that its programming substantially duplicates that of other stations entitled to mandatory carriage already retransmitted by its systems. According to KRTW, however, only one other station presently carried by EagleVision broadcasts home shopping programming similar to that transmitted by KRTW; it is Station KHSH-TV (Ind., Channel 67), Alvin, Texas. KRTW, therefore, asks the Commission to require that EagleVision add its signal immediately, and that forfeitures be imposed upon it for its willful and repeated violations of the mandatory carriage rules, pursuant to Section 503(b)(1)(B) of the Communications Act of 1934, as amended.

3. According to EagleVision, ten of its operations already devote the maximum amount of channel space required by Commission rules to be dedicated to the retransmission of local commercial television signals, pursuant to Section 76.56(b)(2) and (b)(4) of the Commission's Rules. Therefore, it is said, these operations are not required to add KRTW's signal. Moreover, EagleVision states that most of its systems already carry the signal of KHSH (Channel 67), Houston, Texas, a commercial station entitled to mandatory carriage that is an affiliate of the Home Shopping Network and which also broadcasts home shopping programming fulltime.[2] According to EagleVision, KRTW is affiliated with Value Vision which ". . . presents on a full-time basis, satellite-delivered sales presentations. . . ." and ". . . substantially duplicates the home shopping programming of KHSN for much more than 50 percent of the broadcast week."[3] Therefore, EagleVision argues that either a literal reading or a special application of Section 76.56(b)(5) of the Commission's Rules also exempts these systems from mandatory carriage of KRTW. EagleVision is aware that one station may be selling jewelry, while the other is demonstrating pots and pans, but it maintains that there is little real difference between the two in their manner of selling or discussing their wares or in what little visual or intellectual information they present, unlike the news, drama, or comedy of other commercial stations.

4. EagleVision also notes that the burden of adding KRTW to its seven systems with fewer than 100 subscribers, or to its other eleven systems with fewer than 250 subscribers, would be particularly expensive relative to their potential revenues, because it would ". . . include addition of receiving and signal processing equipment, readjustment and purchase of new traps, and labor costs. . . ." Therefore, EagleVision requests that the Commission waive its mandatory carriage requirement for these systems, even though they may have more than the twelve activated channels specified in the Commission's present exception to its rules. Section 76.56(b)(5) of the Commission's Rules. Finally, EagleVision states that, since it will obey any Commission order, and has not denied KRTW carriage for any malicious or anti-competitive reason, but rather because of its sincere belief that the programming of KHSH and KRTW are essentially duplicative of each other, it should not be subject to forfeiture or to other Commission sanctions, citing n.205 to the Commission's *Report and Order* in MM Dockets 92-259, 90-4, and 92-295, 8 FCC Rcd 2965, 2982 (1993).

5. In its reply, KRTW repeats its request for Commission sanctions against EagleVision, noting the failure of Eaglevision to comply with the substantive or procedural[4] aspects of the rules, to present sufficient evidence to demonstrate that the rules are inapplicable, or even any attempt to quantify the cost of adding KRTW to its smaller systems. Finally, KRTW asserts that no other Houston area station broadcasts Value Vision programming, and that comparing it to the home shopping programming provided by KHSH would involve the Commission in content-based judgements, thereby compromising the Constitutionally-mandated content neutrality of its mandatory carriage rules, citing the Commission's *Report and Order* in MM Docket 93-8, 8 FCC Rcd 5321, 5329 (1993).

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[1] On April 26, 1994, the Commission was requested to substitute VVI Baytown, Inc. for Pray, Inc. in this proceeding, and on June 6, 1994, KRTW changed its call sign to KVVV.

[2] The identity of this signal actually is Television Broadcast Station KHSH (Ind., Channel 67), Alvin, Texas.

[3] As KRTW points out, the station referred to is actually an Alvin, Texas station with the call letters KHSH.

[4] Including in particular Section 76.58(e) of the Rules.

DISCUSSION

6. Based on the information in its filing, sworn to under penalty of perjury by John Bailie, general manager of EagleVision based on his personal knowledge, it appears that EagleVision on its systems in Colony Oaks - TX1772, Idlewood Park - TX1986, Kempwood Village - TX1666, La Fontaine - TX1988, Napoleon Square - TX2038, Parkway - TX1780, Parkway - TX1780, Meadowridge - TX 1987, Rivertree (TX2036), Thousand Oaks - TX1787, and Westborough Crossing - TX1649 has already devoted the maximum amount of channel space to the carriage of commercial broadcast station signals that is required by the statute. Accordingly, with respect to these operations, KRTW's complaint will be denied. With respect to the other operations, however, EagleVision has not justified its failure to comply with the applicable rules and statutorily-mandated carriage provisions. EagleVision has failed to introduce any evidence, other than mere conclusory statements, to justify its request that it not be required to comply with the rules. As KRTW points out, Eagle Vision has submitted no data relative to the potential revenues versus the potential expenses which might be incurred by the smaller systems if they were required to add KRTW.

7. We also reject EagleVision's contention that programming supplied by one shop-at-home broadcast station is by its very nature, substantially duplicative of that supplied by any other shop-at-home broadcast station. The mere fact that two stations share the same format is not grounds for concluding that their programming is duplicative for purposes of the Commission's must carry rules. The Commission's standard for what constitutes duplicative programming is set forth in Section 76.56(b)(5) of the Rules, and EagleVision has failed to introduce any evidence pursuant to this rule's requirements. Furthermore, the Commission has held that it would not be in the public interest for it to base waivers of its rules upon considerations of format. *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981).[5]

ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, that the "Complaint" filed December 16, 1993, by Pray, Inc., licensee of Television Broadcast Station KRTW, IS DENIED with respect to Colony Oaks - TX1772, Idlewood Park - TX1986, Kempwood Village - TX1666, La Fontaine - TX1988, Napoleon Square - TX2038, Parkway - TX1780, Parkway - TX1780, Meadowridge - TX 1987, Rivertree (TX2036), Thousand Oaks - TX1787, and Westborough Crossing - TX1649 and otherwise IS GRANTED in accordance with Section 614(d)(3) (47 U.S.C. 534) of the Communications Act, as amended.

9. IT IS FURTHER ORDERED, That Nationwide Communications, Inc. d/b/a/ EagleVision SHALL CARRY the signal of Television Broadcast Station KVVV (Ind., Channel 57), Baytown, Texas (formerly, KRTW), in compliance with this Order within forty-five (45) days of its release date.

10. IT IS FURTHER ORDERED, That Nationwide Communications, Inc. d/b/a/ EagleVision SHALL FULLY COMPLY with Section 76.58(e) of the Commission's Rules by refiling the required notice in accordance with the provisions of Section 76.58(e) for each of the systems involved within fifteen (15) days of the release date of this Order.

11. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[5] Based upon the record before us, we will not issue a forfeiture against EagleVision at this time. However, in response to this *Order* and in the future we expect more careful compliance with the requirements of the rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Greater Dayton	CSR-4027-M
Public Television against	OH0045
Chillicothe Cablevision dba	
Dimension Cable Services	

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: January 20, 1995; Released: February 2, 1995

By the Cable Services Bureau:

1. On August 26, 1993, a petition on behalf of Greater Dayton Public Television, licensee of Television Broadcast Station WPTD (Educ., Ch. 16), Dayton, Ohio, was filed with the Commission claiming that Chillicothe Cablevision dba Dimension Cable Services ("Dimension"), operator of a cable television system serving Washington Court House, Bloomingburg, Sabina, Jeffersonville, Milledgeville, Octa, Union, and portions of Clinton County, Ohio, had declined to carry the station, even though the city of license of WPTD is within fifty miles of the system's principal headend located at Latitude 39°31'38" and Longitude 83°28'37", and the station is therefore a "local" signal within the meaning of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). WPTD also requests that the Commission not only order Dimension to carry the signal, but also order the system to carry it on Channel 16, the channel on which it broadcasts over-the-air. Oppositions to this petition were filed on September 16, 1993 and October 21, 1993, on behalf of Dimension, to which WPTD has replied.

2. In support of its request, WPTD states that it was notified by Dimension on April 26, 1993, that it did not provide a good quality signal at Dimension's headend.[1] By letter dated May 28, 1993, WPTD states that it agreed to bear the costs of providing the pre-amplifier necessary to provide a good quality signal, but in a June 25, 1993 response, Dimension placed several conditions on the type, use and ownership of the proposed equipment. On July 27, 1993, WPTD indicates that it reiterated its agreement to bear the costs of the equipment and also agreed to use a Blonder-Tongue SCMA-ub low-noise 25-dB preamplifier. It also requested to discuss the proposal with Dimension, however, WPTD asserts that Dimension neither responded to this request nor commenced carriage of its station.

3. Dimension's September 16, 1993 opposition does not dispute that WPTD is a qualified NCE station, but it maintains that until such time as WPTD provides a good quality signal at Dimension's headend the station is not eligible to be carried. Dimension argues that it has repeatedly expressed its willingness to allow WPTD to provide the equipment necessary to ensure a good quality signal and it will add the station in forty-five days once the equipment is in place. However, Dimension disagrees with WPTD's contention that the station is only obligated to reimburse Dimension for the cost of the necessary equipment. Dimension feels that it should be incumbent upon the requesting station to provide the equipment and it requests that the Commission explicitly state this in its decision.

4. WPTD's response indicates that on September 14, 1993, the parties agreed by telephone that WPTD would purchase a 12.5 -dB gain antenna and a pre-amplifier to rectify its signal deficiency at Dimension's headend. Indeed, WPTD states that it ordered the equipment on September 20, 1993, with an expected delivery date in 3-6 weeks. Upon its installation, Dimension agrees that it will be required to add WPTD within 45 days. Despite the fact that in this instance WPTD agreed to purchase the equipment as requested, it disagrees with Dimension's view that a television station should be required to purchase any necessary equipment, rather than provide reimbursement for costs, in all instances. WPTD has encountered many cable system operators that prefer to buy their own equipment. Dimension's requirement is too narrow and would inhibit future negotiations between television stations and cable operators. Therefore, the FCC should not render this type of arrangement mandatory. Finally, WPTD points out that Dimension has made no mention in any of its negotiations that it will carry WPTD on-channel as requested. WPTD requests that the FCC uphold and enforce its right to such carriage.

5. On October 21, 1993, Dimension submitted a second opposition to WPTD's petition. It states that although the problem with signal quality has been resolved, the issue of channel positioning remains an area of contention. Dimension avers that carriage of WPTD on-channel would result in several serious and substantial technical complications and would cause potential interference. Dimension states that channel 16, the channel on which WPTD broadcasts over-the-air, is the aeronautical frequency band on which it maintains a narrow tolerance of 5 kHz, pursuant to §76.612(a)(1) of the Rules. Meeting the on-channel requirement, Dimension contends, would be nearly impossible using standard equipment as the signal processor device required to carry an off-air signal on channel 16 has two local oscillators which will not hold the 5 kHz tolerance. To ensure stability, Dimension states that it would be required to either 1) phase lock the channel 16 processor to a comb generator at a cost of $6800, or 2) demodulate and modulate the signal at a cost of $5300. In addition, it continues, further technical modifications, such as additional traps, brackets and "F" connectors, would be necessary solely to carry WPTD on-channel. Dimension maintains that all of this would cost approximately $31,000

[1] Dimension indicated that on April 22, 1993, WPTD was measured at -60 dBm at its headend. The measurements were taken with a Wavetek Sam III/UHF field strength meter and reception was taken on a Radio Shack Model U-75 UHF broadband antenna 30' above grade.

or $4.30 per subscriber. Further, it feels it likely that the additional traps and "F" connectors would increase signal leakage on its system, thus increasing the system's monitoring and maintenance costs in this area.[2] Finally, Dimension argues that the use of traps would have a negative variance effect of 5 dB on the signal quality of adjacent channels, particularly the sound carrier. This could cause problems for Dimension in meeting the FCC aural carrier level standards that require cable operators to maintain an aural signal between 10 and 17 dB below the associated visual signal level. Dimension concludes, therefore, that while it recognizes its obligation to honor WPTD's on-channel carriage request, it should be not required to do so in this instance due to the potential problems. It stands prepared to discuss alternative channel positions with WPTD at any time.

6. WPTD requests that the Commission strike Dimension's second opposition as duplicative and untimely. It avers that Dimension had ample opportunity to raise the issue of alleged technical and cost objections to on-channel carriage in its September 16, 1993 filing. Should the FCC consider the arguments raised in this pleading, however, WPTD contends that Dimension's claims are unsubstantiated and it has provided no evidence that clearly demonstrates that it cannot meet this requirement. *See* Paragraph 91 of the *Report and Order in MM Docket 92-259*, 8 FCC Rcd 2965 (1993). WPTD argues that there is no "substantial technical or signal security problem" with regard to Dimension's aeronautical frequency band concern. Dimension admits that the technology is readily available to ensure WPTD on-channel carriage. WPTD should therefore not be penalized because cable systems, such as Dimension, have chosen the frequency band of 118-136 MHz for channels 14-16. Moreover, the majority of Ohio and Indiana cable operators which carry WPTD on channel 16 have made equipment modifications at their own expense.[3] WPTD states that Dimension's cost estimates, without further documentation, are inadequate and possibly higher than necessary.

7. Further, it maintains that it would be against the intent of the 1992 Cable Act to require an NCE station to pay for a cable system's upgrades in plant in circumstances of this kind. The equipment necessary for on-channel carriage, avers WPTD, should be considered a business investment by the cable system, not the station. In the *Clarification Order in MM Docket 92-259*, 8 FCC Rcd 4142 (1993), the Commission limited a station's expenditures to situations of low signal level. WPTD has already agreed to incur those expenses in this instance. Further, WPTD contends that Dimension's assertions as to additional equipment needs, signal leakage concerns and alleged effects on audio quality are all speculative, unpersuasive and not considered sufficient to deny an on-channel carriage request. *See Report and Order, supra*, at Paragraph 91. WPTD points out that 1) all of the equipment cited by Dimension is already in use on the system, 2) a potential for signal leakage exists any time a cable is cut to insert traps or equipment, and 3) Dimension's alleged "negative effect" argument is unacceptable without supporting documentation, particularly when WPTD is aired on channel 16 on other Dayton area cable systems without similar complaints. In conclusion, WPTD requests that the FCC dismiss Dimension's arguments and order it to carry WPTD on-channel as required by the Rules.

8. We are not persuaded by Dimension's request that the FCC explicitly require that any equipment needed to correct the reception of a poor quality signal be purchased by the television station requesting carriage. The *Report and Order, supra*, at paragraph 104 states that "Further, we generally agree with cable interests that it is the television station's obligation to bear the costs associated with delivering a good quality signal to the system's principal headend." (emphasis supplied) Generally, therefore, we would expect that, once those costs have been determined to the parties' satisfaction, the cable operator be the entity responsible for whatever modifications are necessary since the facility is under its control. However, if the parties so desire they are free to make whatever agreements they wish in this regard.

9. Section 614(b)(6) of the 1993 Cable Act permits a must-carry station to elect its over-the-air channel number as its channel position on a cable system and WPTD has properly chosen its over-the-air channel. Further, the Commission has stated previously that cable operators must comply with the channel positioning requirements, absent a compelling technical reason.[4] Dimension has failed to make such a demonstration. The Commission specifically held that the need to replace traps, or to reconfigure the basic tier, or to make technical changes are generally not grounds for waiver. Carriage of television stations, such as WPTD, on a channel located in the aeronautical frequency band is a common practice in the cable industry. Dimension has failed to demonstrate how its carriage of WPTD on channel 16 would involve any special circumstances beyond the necessity of simply meeting the Commission's technical standards. In this regard, all cable operators are required to routinely monitor their systems to detect and correct signal leakage problems in compliance with the Commission's technical rules. See §76.601 *et seq.* of the Commission's Rules. Further, Station WPTD's obligations to provide a good quality signal stop at the point where such is delivered to Dimension's cable television system's headend. WPTD is under no obligation to pay for the necessary equipment used by the cable system to process and distribute WPTD's signal. *See Report and Order, supra.*

10. Accordingly, in light of the above, we do not believe that a waiver of the must-carry rules with respect to Dimension's system serving Washington Court House, Bloomingburg, Sabina, Jeffersonville, Milledgeville, Octa, Union, and portions of Clinton County, Ohio, serves the public interest.

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[2] Dimension states that 33% of its reportable leakage is due to "F" connectors, as well as over 10% of its service calls.

[3] WPTD encloses materials from Scientific-Atlanta and the NCTA which describe the available techniques used to comply with the FCC's technical standards.

[4] As stated in Paragraph 91 of the *Report and Order, supra*, "We do not believe that inconvenience, marketing problems, the need to reconfigure the basic tier or the need to employ additional traps or make technical changes are sufficient reasons for denying the channel positioning request of a must-carry signal. Only where placement of a signal on a chosen channel results in interference or degraded signal quality to the must-carry station or an adjacent channel, or causes a substantial technical or signal security problem, will we permit cable operators to carry a broadcast signal on a channel not chosen by the station."

11. WPTD's petition, therefore, establishes that it is entitled to carriage on the system serving Washington Court House and surrounding communities and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under Section 5 of the 1992 Cable Act. Accordingly, the petition filed August 26, 1993, by Greater Dayton Public Television IS GRANTED, pursuant to Section 615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Chillicothe Cablevision dba Dimension Cable Services IS ORDERED to commence carriage of WPTD on cable channel 16 forty-five (45) days from the release date of this *Order*.

12. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Corp.,
Complainant,

v.

Cable & Wireless, Inc., File No. E-95-1
Defendant.

ORDER

Adopted: January 26, 1995; Released: February 2, 1995

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On October 12, 1994, AT&T Corp. (AT&T) filed the above-captioned formal complaint against Cable & Wireless, Inc. (C&W). The complainant alleged that C&W had violated, inter alia, Sections 201(a), 201(b), and 202(a) of the Communications Act of 1934, 47 U.S.C. §§ 201(a), 201(b), and 202(a). On January 23, 1995, the parties filed a joint motion to dismiss with prejudice, stating that a mutually agreeable settlement had been reached, with the defendant admitting no liability.

2. We are satisfied that granting the parties' motion to dismiss the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and that the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Time Warner Cable
Winter Springs, Florida
City of Maitland, Florida

CUID Nos. FL0190 and FL0194

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: December 30, 1994; Released: January 3, 1995

By the Chief, Cable Services Bureau:

INTRODUCTION

1. Here we consider complaints about the price Time Warner Cable ("Time Warner") was charging for its cable programming service ("CPS") tier in Winter Springs, Florida, CUID No. FL0190, and Maitland, Florida, CUID No. FL0194. Time Warner has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of Time Warner's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

PROCEDURAL MATTERS

4. The first complete and timely CPS complaint was served on Time Warner on January 20, 1994 for CUID No. FL0190 and on January 17, 1994 for CUID No. FL0194.[11] The Commission received the complaint on January 31, 1994 for CUID FL0190 and on January 24, 1994 for CUID No. FL0194.

5. Time Warner attempted to justify its CPS price through FCC Form 393s filed on February 15, 1994 for both CUID Nos. FL0190 and FL0194. Time Warner amended its justifications on June 1, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[12]

DISCUSSION

6. Time Warner asserts that its monthly CPS tier price of $12.44 per subscriber is justified by its benchmark filings because its price is less than the maximum permitted charge of $ 12.51 as calculated in the filings. Upon review of Time Warner's Form 393, we have found no apparent errors that would result in Time Warner's CPS tier price exceeding its maximum permitted price.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Time Warner has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Time Warner implemented its CPS price under the new regulations. See para. 3, *infra*. Further, to the extent that the price for the period ending May 14, 1994 is found to be excessive, a reduction in Time Warner's price for the period after May 14, 1994 must be implemented to reflect the fact that Time Warner's price during the earlier period, which is used as a starting point to calculate its price for the prospective period, was unreasonable.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *Second Order on Reconsideration*, at 4119; 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

[11] The complaints were dated January 20, 1994 for CUID No. FL0190 and January 17, 1994 for CUID No. FL0194 and state that the complaints were mailed to Time Warner on those dates. Time Warner has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider the mailing dates of January 20, 1994 and January 17, 1994 as the service dates.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526 (released May 23, 1994).

CONCLUSIONS

7. Upon review of the record herein, we conclude that Time Warner's showing supports a maximum reasonable CPS tier price of $12.44 per month (plus franchise fee) for the periods of January 31, 1994 to May 14, 1994 in CUID No. FL0190 and January 24, 1994 to May 14, 1994 in CUID No. FL0194.[13]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints against the cable programming service price charged by Time Warner Cable, in Winter Springs, Florida, CUID No. FL0190 and Maitland, Florida, CUID FL0194, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED, that the benchmark filings submitted by Time Warner Cable with respect to CUID Nos. FL0190 and FL0194, for the periods of January 31, 1994 to May 14, 1994 and January 24, 1994 to May 14, 1994, justify a maximum price of $12.44 per month (plus franchise fee) for Time Warner Cable's cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[13] This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein. This finding is based solely on the representations of Time Warner listed in paragraph 5, *supra*, and the modifications described in paragraph 6, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Participation by COMSAT Corporation in a New Inmarsat Satellite System Designed to Provide Service to Handheld Communications Devices	File No. ISP-95-003

ORDER

Adopted: January 6, 1995; Released: January 10, 1995

By the Chief, International Bureau:

1. On December 1, 1994, TRW, Inc. filed an "Emergency Motion for Temporary Relief." It asks the Commission to issue certain orders to COMSAT Corporation regarding its proposed investment in the Inmarsat-P mobile satellite service.[1] Acknowledging that in its *Inmarsat-P Declaratory Ruling*, the Commission refused to declare that COMSAT could not "participate" in Inmarsat-P,[2] TRW asks us to revisit the legality of such "participation" on the basis of information not previously on the public record. In the alternative, TRW asks the Commission to preserve the *status quo* by prohibiting any COMSAT investment in Inmarsat-P until the Commission decides that the Affiliate is structured consistently with the *Inmarsat-P Declaratory Ruling*. COMSAT opposes TRW's motion. Motorola Satellite Communications, Inc. filed comments in support of TRW's motion.[3]

2. The Bureau denies TRW's motion. The "new information" submitted by TRW sheds little additional light on the nature of the Affiliate, largely because the Affiliate has not yet been created and therefore has no structure. As for the alternative temporary relief sought by TRW, we find that such relief is not necessary to prevent irreparable injury to TRW; that it would cause irreparable injury to COMSAT and perhaps other Inmarsat Signatories; and that it would not be in the public interest.

BACKGROUND

3. The International Maritime Satellite Organization (Inmarsat) has for several years contemplated a global, handheld, satellite telephone service to be known as Inmarsat-P. Inmarsat-P would provide voice, facsimile, and data service not only to maritime users, but to international business travelers, small aircraft, and "quasi-fixed" commercial, industrial, and governmental users in remote areas.

4. Inmarsat-P service will be offered not by Inmarsat itself, but by a private corporation that has come to be known as the "Affiliate." Inmarsat itself is expected to own fifteen percent of the Affiliate, and individual Inmarsat Signatories such as COMSAT may elect to make further investments on their own. Initially, Inmarsat and the Affiliate are expected to enter into contracts for Inmarsat to provide technical support, management, and other services. Inmarsat itself will be the exclusive wholesaler of certain maritime and aeronautical services provided through the Affiliate. The Affiliate is expected commence Inmarsat-P service in 1999 or 2000.

5. In the *Inmarsat-P Declaratory Ruling*, the Commission acted on Motorola's petition for a declaration that COMSAT's provision of Inmarsat-P service would be inconsistent with the International Maritime Satellite Telecommunications Act.[4] After agreeing with Motorola that COMSAT could not provide Inmarsat-P service through Inmarsat itself, the Commission held that it was possible for COMSAT to provide Inmarsat-P service through the Affiliate -- if it were structured properly. Specifically, the Commission stated that

> if COMSAT's participation in Inmarsat-P takes a form that extends COMSAT's exclusive status within Inmarsat, then it is inconsistent with the Maritime Satellite Act . . . . If, however, COMSAT's participation in Inmarsat-P takes a form which does *not* extend COMSAT's exclusive status, then such participation would be legally permissible . . . . We cannot determine whether Inmarsat-P will extend COMSAT's exclusive status until COMSAT files a formal application with us.[5]

6. The *Inmarsat-P Declaratory Ruling* also contained some "observations" about how the Commission will determine whether any particular structural arrangement "extends COMSAT's exclusive status within Inmarsat." First, the Commission said that its test was directed toward "real-world, competitive consequences," not mere matters of form.[6] Second, the Commission said it would "examine not only who participates, but who is not permitted to do so."[7] In this regard, the Commission noted that substantial investment by Inmarsat Signatories would not necessarily flunk the test as long as investment in the Affiliate were "open to the participation of a suitable cross-section of non-Signatory telecommunications entities and other investors. . . . By contrast (to take an extreme case), if participation in the new venture were restricted to Inmarsat and its Signatories, it would be impossible for us to conclude that

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[1] *See generally* In re Petition of Motorola Satellite Communications, Inc. for Declaratory ruling Concerning Participation by COMSAT Corporation in a New Inmarsat Satellite System Designed to Provide Service to Handheld Communications Devices, FCC 94-296 (adopted Nov. 17, 1994) (the "*Inmarsat-P Declaratory Ruling*").

[2] *Id.*

[3] Motorola's comments were not permitted under our rule governing applications for temporary relief, but we denied COMSAT's motion to strike them on the grounds that the staff had already considered them. Instead, we received the comments but permitted COMSAT to file a reply. *See generally* In re Participation by Comsat Corporation in a New Inmarsat Satellite System Designed to Provide Service to Handheld Communications Devices, DA 94-1561 (adopted Dec. 16, 1994, by the Chief, International Bureau).

[4] 47 U.S.C. §§ 751-757 (the "Maritime Satellite Act").

[5] *Inmarsat-P Declaratory Ruling* ¶ 3.

[6] *Id.* ¶ 49.

[7] *Id.* ¶ 50.

COMSAT were participating in a non-Inmarsat venture."[8] Third, the Commission stressed that the "competitive focus" of its test required an examination of the Affiliate's "operational principles as well as its finances, to see whether any special privilege is directly or indirectly attached to Signatory status *per se*."[9]

7. The Inmarsat Council is scheduled to meet in an extraordinary session beginning January 10, 1995, at which time the Council will give final consideration to issues relating to the Affiliate. A first meeting of those who have pledged to invest in the Affiliate will begin on January 17, and a first meeting of the Affiliate's shareholders will take place January 24. The first meeting of the Affiliate's Board of Directors is expected to take place shortly thereafter.

SUMMARY OF THE PLEADINGS

8. In its motion, TRW asks for "temporary emergency relief in the form of an order enjoining any action or failure to act by [COMSAT] that would in any way permit or support, directly or indirectly, any investment by Comsat in the proposed Inmarsat-P affiliate."[10] TRW presents this request as a means of preserving the *status quo* until such time as the Commission has determined whether COMSAT may lawfully invest in the proposed Affiliate. However, TRW contends that this latter determination should be made *now*, on the basis of information that was not on the public record when the Commission issued its *Inmarsat-P Declaratory Ruling*. TRW then contends in the alternative that if the Commission cannot yet determine whether COMSAT has complied with the *Inmarsat-P Declaratory Ruling*, the Commission should preserve the *status quo* by granting the requested relief. TRW argues that this relief is justified under the four-part *Virginia Petroleum Jobbers* test[11] because: (a) TRW is likely to prevail in demonstrating that the Affiliate's structure is not consistent with the Commission's *Inmarsat-P Declaratory Ruling;* (b) TRW will be irreparably harmed if COMSAT invests in Inmarsat-P before a Commission decision on the structure of the Affiliate; (c) COMSAT will not be harmed by the requested relief; and (d) the requested relief is in the public interest.

9. In alleging that Commission action is necessary to prevent irreparable injury, TRW places great emphasis on the upcoming Council meeting at which Inmarsat is expected to invest in the Affiliate. TRW states that once Inmarsat decides to invest in the Affiliate, all Inmarsat Signatories, including COMSAT, will be required to commit funds to Inmarsat.[12] Based on Inmarsat's expected investment of US$150 million, TRW calculates that COMSAT's share of this Inmarsat investment -- which we shall refer to as COMSAT's "indirect investment" -- will be "a minimum of $33,000,000."[13] TRW argues that this "indirect investment" will be so large that

> the Commission would be unable to ignore [it] when Comsat finally files an application either to invest in the Affiliate or to provide Inmarsat-P service within the United States. Indeed, Comsat can be expected to argue -- as it has on many prior occasions -- that the Commission has no choice but to approve its participation in the Affiliate once it has made such a financial commitment.[14]

Thus TRW cautions that unless the Commission acts now to prohibit COMSAT from supporting any investment in the Affiliate, COMSAT may become obligated to make an "indirect investment" of such magnitude that the Commission will be presented with a " *fait accompli*" when it is called upon to approve or disapprove the structure of the Affiliate.[15]

10. COMSAT's opposition to the TRW motion states that the "new information" supplied by TRW is insufficient to permit a Commission decision on the structure of the Affiliate at this time -- even if the information were accurate and relevant, which COMSAT denies.[16] In addition, COMSAT argues that, under *Virginia Petroleum Jobbers*, TRW is not entitled to the "temporary emergency relief" it requests because: (a) TRW is not likely to demonstrate that the Affiliate's structure is inconsistent with the *Inmarsat-P Declaratory Ruling;* (b) TRW has not demonstrated that it will be irreparably harmed if COMSAT is permitted to support Inmarsat-P pending a Commission ruling on the Affiliate's structure; (c) COMSAT, Inmarsat, and the Affiliate's other potential investors would be irreparably harmed if TRW's motion were granted; and (d) the requested relief is not in the public interest.

11. Motorola filed comments in support of the TRW motion,[17] expanding upon the legal basis for the relief requested by TRW. Citing satellite procurement cases, Motorola states that the Commission has always required COMSAT to apply to the Commission before investing in Inmarsat or Intelsat programs. From this premise, Motorola argues that COMSAT must file an application for authority to invest in the Affiliate before it commits any funds to Inmarsat. Motorola also observes that the Commission has statutory authority under the Maritime Satellite Act to "institute such proceedings as may be necessary to carry out" the Act's designation of COMSAT as the sole U.S. Signatory to Inmarsat, with all of the duties implied by that designation.[18] Motorola seconds TRW in urging the Commission to exercise this authority, and to

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[8] *Id.*

[9] *Id.* ¶ 51.

[10] TRW Emergency Motion for Temporary Relief (Dec. 1, 1994), at 1.

[11] Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n, 259 F.2d 921 (D.C. Cir. 1958).

[12] TRW Motion at 5-6 (citing, among other things, 47 U.S.C. § 752(d)).

[13] *Id.* at 6. TRW also points out that COMSAT, like any other Inmarsat Signatory, may also decide to make a "direct investment" in the Affiliate, in addition to funding its share of any Inmarsat investment.

[14] *Id.* at 6-7 (footnotes omitted).

[15] *Id.* at 9. Counsel for TRW suggested orally that TRW's motion is directed only at *indirect* investment by COMSAT, and the logic of the *fait accompli* argument supports this interpretation. However, the motion is written broadly enough to apply to both indirect and direct investment by COMSAT.

[16] Opposition of COMSAT Corporation to Emergency Motion for Temporary Relief (Dec. 8, 1994), at 4-5.

[17] Motorola's Comments in Support of TRW's Emergency Motion for Temporary Relief (Dec. 8, 1994).

[18] 47 U.S.C. § 752(a)(1).

preserve the *status quo* pending a Commission determination that the Affiliate is structured in accordance with the *Inmarsat-P Declaratory Ruling*. Like TRW, Motorola states that: it will be irreparably harmed if COMSAT invests in the Affiliate; there is "a substantial prospect" that the Affiliate will not be structured in compliance with the *Inmarsat-P Declaratory Ruling;* any harm to COMSAT will be COMSAT's own fault for not placing more information on the public record before the *Inmarsat-P Declaratory Ruling;* and the public interest would be served by a Commission determination of the legality of COMSAT's investment before that investment occurs.

12. In reply to Motorola,[19] COMSAT denies that it is required by existing law to apply for Commission authorization before supporting or investing in the Affiliate. It states that neither a direct nor an indirect investment in the Affiliate would be a satellite procurement, so the cases cited by Motorola are inapplicable. COMSAT states further that although the Commission does indeed have broad authority to carry out its statutory responsibilities, neither TRW nor Motorola has satisfied the four-part *Virginia Petroleum Jobbers* test for temporary relief.

DISCUSSION

A. The Request for an Immediate Ruling on the Affiliate's Structure

13. We have reviewed the "additional information" submitted by TRW and find it insufficient to warrant a Commission ruling on the structure of the Affiliate at this time. We will not address each of TRW's thirteen allegations individually, but note that many were already on the public record at the time the *Inmarsat-P Declaratory Ruling* was issued. Furthermore, TRW does not tie its factual allegations to any analysis of the extent to which the Affiliate attaches special privileges to Signatory status, circumscribes non-Signatory investment, or otherwise extends COMSAT's exclusive status within Inmarsat. Many of the allegations lack any apparent connection to the "real-world, competitive consequences" on which application of the test set forth in the *Inmarsat-P Declaratory Ruling* depends. Nowhere does TRW explain how the Commission could conceivably rule on the structure of the Affiliate without seeing, at a minimum, the organic documents that create and govern that structure. TRW's request for an immediate ruling on the structure of the Affiliate must therefore be denied.

B. The Request for Temporary Relief

14. In the absence of a ruling on the structure of the Affiliate, TRW seeks an order maintaining the *status quo* until such time as the Commission rules on whether the Affiliate's structure comports with the *Inmarsat-P Declaratory Ruling*. TRW submits that it is entitled to such relief if it can demonstrate (a) that TRW has a substantial likelihood of demonstrating that the Affiliate's structure does not comport with the *Inmarsat-P Declaratory Ruling;* (b) that the relief is necessary to prevent irreparable harm to TRW; (c) that the temporary relief will not substantially harm other interested parties; and (d) that the temporary relief will be in the public interest. TRW takes these four conditions from the *Virginia Petroleum Jobbers*[20] test, which the Commission applies when it consider petitions for stays of its own orders.[21]

15. The relief sought by TRW is not in the nature of a stay, as it does not prevent any part of the Commission's *Inmarsat-P Declaratory Ruling* from taking effect. It is, however, a request that the Commission maintain the *status quo* temporarily, and we assume for the sake of discussion that *Virginia Petroleum Jobbers* sets forth the correct standard. Under that standard, we find that TRW has failed to satisfy at least three of the four prongs: the relief is not necessary to prevent irreparable injury to TRW; the relief would substantially harm COMSAT and perhaps other interested parties; and the requested relief is not in the public interest.[22]

1. Irreparable Injury to TRW

16. TRW argues that it will be irreparably injured if COMSAT is permitted to invest in the Inmarsat Affiliate, directly or indirectly, because the Commission would be unwilling to act if it later found that the Affiliate were structured in a way that extended COMSAT's Signatory status. This suggestion is contrary to the Commission's case law[23] and places too little faith in the integrity of the Commission's processes. In the *Inmarsat-P Declaratory Ruling,* the Commission announced the test it would apply to determine whether the Affiliate could be considered a "non-Inmarsat venture." We refuse to assume that the Commission will be unwilling to apply that test fairly and scrupulously when it is presented with a service application from COMSAT. No interested party should make that assumption either.

17. In addition, TRW's argument assumes that if the Commission were to rule on the structure of the Affiliate in advance of any COMSAT investment, it would (or at least might) forbid the investment. This premise is also contradicted by the Commission's cases. The Commission has, as Motorola points out, historically required COMSAT

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[19] Response of COMSAT Corporation to Motorola Comments in Support of TRW Motion (Dec. 22, 1994).

[20] Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n, 259 F.2d 921 (D.C. Cir. 1958). *See also* Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977).

[21] *E.g.*, In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, 8 F.C.C. Rcd. 5585, 5586 (1993).

[22] We express no opinion on the likelihood that the Affiliate's structure will not comport with the *Inmarsat-P Declaratory Ruling*. We see no way to gauge TRW's likelihood of demonstrating anything about the structure of an entity that has not yet been created -- especially when that structure depends upon additional meetings that have yet to be held. We acknowledge that relief may be granted with a lesser showing on this prong -- *e.g.*, the presentation of a "serious legal question" -- when the other three prongs all favor the granting of relief. *Washington Metropolitan Area Transit Comm'n*, 559 F.2d at 844. Here, however, TRW has failed the other three parts of the test.

[23] *E.g.*, In re Communications Satellite Corp., 5 F.C.C. Rcd. 5952, 5956 (1990); Pan American Satellite v. Communications Satellite Corp., 8 F.C.C. Rcd. 5622, 5624 (Com. Car. Bur. 1993).

to apply for authority to "participate in" Intelsat and Inmarsat satellite procurements.[24] But not once has the Commission ruled that such an investment cannot take place. Indeed, the Commission normally rules on such requests after COMSAT has already contributed funds toward the satellite procurement under review, and it is well settled that the actual contribution of funds without prior Commission approval is permissible.[25] These cases demonstrate that even where satellite procurement is at issue -- as Motorola contends it is here -- the result of an unfavorable ruling on COMSAT's application is exclusion of the expenditure from COMSAT's rate base. The remedy requested by TRW is simply not available in these situations.[26]

18. In addition, we note that the order sought by TRW here would actually go further than a ban on contributing funds. It would prohibit COMSAT from "voting, or otherwise directly or indirectly acting or failing to act, in a manner that would support any Inmarsat or Comsat investment or commitment to invest in the Affiliate."[27] Such an order would appear to require that COMSAT *oppose* Inmarsat investment in the Affiliate, which is inconsistent with the United States government's conditional support for the Affiliate concept at the recent Inmarsat Assembly of Parties.[28]

19. TRW and Motorola both attempt to distinguish procurement cases in which the rate-base remedy has been applied. TRW argues that the issue here is not harm to ratepayers but "an *ultra vires* act by Comsat and a violation of the Maritime Satellite Act as interpreted by the Commission in the [*Inmarsat-P Declaratory Ruling*].[29] Motorola similarly states that the rate-base remedy would be "worthless to Motorola" because "[t]he competitive harms to Motorola and TRW that would flow from a U.S. investment and sponsorship of Inmarsat-P within an international governmental organization could not be reversed by different accounting treatment."[30] But these arguments are also based on an incorrect premise: that the Maritime Satellite Act forbids investment by COMSAT to the same extent that it forbids provision of service by COMSAT. This position is impossible to reconcile with the Commission's *Inmarsat 3 Procurement* decision.[31] There, the Commission approved COMSAT's contribution of funds toward Inmarsat's procurement of satellites for aeronautical services without deciding whether COMSAT could actually use those same satellites to provide those same services. As the Commission stated with admirable concision, "[P]rocurement authorization is not the same as service authorization."[32]

20. In summary, TRW has not demonstrated that the relief it requests is necessary to prevent irreparable injury because COMSAT's investment in the Affiliate, either directly or indirectly, in no way diminishes any remedy that would be available to TRW today. TRW's arguments to the contrary are based on misunderstandings about the nature of the remedies that would be available today.

2. Substantial Harm to Other Parties

21. TRW also fails to demonstrate that the relief it requests would not cause substantial harm to COMSAT or other interested parties. TRW argues that COMSAT needs Commission approval before it may invest anyhow, so no harm can come from being required to seek that approval now rather than later. We agree with COMSAT that the relief requested by TRW would effectively prevent COMSAT from participating in the upcoming meetings, and would certainly prevent COMSAT from investing in the Affiliate. It is far easier for the Commission to retroactively exclude an expenditure from the rate base, should that be appropriate, than it would be for the Commission to retroactively give COMSAT another opportunity to participate in the formation of the Affiliate. In addition, we are mindful of the harm that might well be suffered by other Inmarsat Signatories if the United States -- having expressed its conditional support for the Affiliate -- reversed course at the eleventh hour.

3. The Public Interest

22. Finally, TRW and Motorola argue that the requested relief will serve the public interest by securing an early determination of whether the Affiliate's structure complies with the *Inmarsat-P Declaratory Ruling*. We reject this argument, which seems to assume (contrary to the *Inmarsat-P Declaratory Ruling)* that the Commission already has all the information it needs to rule on the Affiliate's structure. As we have stated above, we do not believe the standards in the *Inmarsat-P Declaratory Ruling* can be applied to the structure of an Affiliate that does not yet exist. Thus, the likely result of granting TRW's motion would not be to expedite resolution of an outstanding legal controversy. It would be to delay and almost certainly disrupt Inmarsat deliberations by reneging on U.S. expressions of support.

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[24] This oversight function is authorized by specific provisions of the Maritime Satellite Act, 47 U.S.C. §§ 752-753. In re Communications Satellite Corp., 7 F.C.C. Rcd. 6278, 6278 (1992). It has been implemented for COMSAT participation in Inmarsat procurements by analogy to the Commission's statutory authority over COMSAT participation in Intelsat procurements, *e.g.*, 47 U.S.C. § 721(c)(9).

[25] *PanAmSat v. COMSAT*, 8 F.C.C. Rcd. at 5623 n.24 (citing *Planned Domestic Services Order*, 3 F.C.C. Rcd. 7108, 7110 (1988)).

[26] It is incorrect to suggest, as one commentator recently did, that the Commission has a "Goldilocks problem" in finding the right time to rule on COMSAT's participation in Inmarsat or Intelsat satellite procurements. *See "Goldilocks Problem,"* Communications Daily, Dec. 28, 1994, at 2. The Commission has repeatedly stated that it is unwilling to prohibit COMSAT from contributing funds to Inmarsat or Intelsat because any such order, if followed, would jeopardize U.S. participation in organizations to which the United States is bound by international agreements. Timing has nothing to do with this question. On the contrary, the Commission has stated in the Intelsat context that "international commitments and practical realities limit the Commission's flexibility in acting on Comsat's applications. *And that would be true whether we acted on the applications before the first component is manufactured or now, when the first satellite is soon to be launched.*" In re Communications Satellite Corp., 82 F.C.C.2d 377, 380 (1980) (emphasis added).

[27] TRW Motion at 4.

[28] *See* Statement by the Representative of the Party of the United States of America, Annex V to the Report of the Tenth (Extraordinary) Session of the Inmarsat Assembly, at A33. *Cf.* In re Communications Satellite Corp., 3 F.C.C. Rcd. 7108, 7110 (1988).

[29] TRW Motion at 7 n.12.

[30] Motorola Comments at 14-15.

[31] In re Communications Satellite Corp., 7 F.C.C. Rcd. 6278 (1992).

[32] *Id.*, 7 F.C.C. Rcd. at 6280.

That would not be in the public interest. Nor would it be in the public interest for us to silence COMSAT in the upcoming meeting of the Inmarsat Council, thereby depriving the United States of any pro-competitive influence at precisely the time when many important questions about the structure of the Affiliate will be decided.

C. The Need for COMSAT to File an Application

23. In ruling on this motion, we have not found it necessary to reach any conclusion about whether a COMSAT investment in the Affiliate is tantamount to an Inmarsat facilities procurement, which would oblige COMSAT to file an application for Commission authorization. We have decided, rather, that even if such an application was required in this case, the possible outcomes of that proceeding would not include the relief requested by TRW.

24. Nonetheless, questions remain about when and perhaps whether COMSAT should file an application for Commission authorization to invest in the Affiliate or "participate in" its facilities procurements. Motorola believes the Commission's Inmarsat and Intelsat procurement cases are about the flow of money from COMSAT to Inmarsat or Intelsat, and that a COMSAT application should therefore be required before any COMSAT funds become committed.[33] The implication of this interpretation would be that COMSAT should already have filed an application and, having failed to do so, should file one now. COMSAT, on the other hand, says the Inmarsat and Intelsat procurement cases are about the facilities of the international satellite organizations. Because a COMSAT investment in the Affiliate does not, by itself, have any effect on facilities, COMSAT believes no application is required at this stage."[34] This view might imply that COMSAT should file an application shortly before the Affiliate actually procures its satellite facilities, but not when COMSAT is merely investing in the Affiliate.

25. We believe these rival interpretations of the Commission's procurement cases beg the larger question of whether the Commission's duty to oversee COMSAT participation in the Affiliate is coextensive with its duty to oversee COMSAT participation in Inmarsat. On the one hand, Inmarsat's investment in the Affiliate, and the contractual relationship between them for the provision of certain services, may be thought to affect Inmarsat facilities just as surely as a new generation of Inmarsat satellites would. On the other hand, it might be argued that the Affiliate's facilities procurements should not be subject to Commission review unless the Affiliate is functionally indistinguishable from Inmarsat. It is not clear to us that the Commission's future oversight of the Affiliate is entirely determined by whether the Affiliate's structure complies with the *Inmarsat-P Declaratory Ruling,* though these two issues are almost certainly related.

26. The instant motion, decided upon a shortened pleadings cycle with a limited number of participants, is not the proper forum for determining when or whether COMSAT must seek Commission authorization for its investments in the facilities of the Affiliate. However, we believe the question should be answered relatively quickly, for the sake of COMSAT's ratepayers. Accordingly, as an interim matter, we will require COMSAT to apply for Commission authorization prior to any decision by the Affiliate to procure facilities that will be used to provide Inmarsat services. We will require such applications from COMSAT until such time as the Commission can determine the extent to which we shall regulate COMSAT's investment in the Affiliate. We stress that this is an interim solution, which the Commission may abandon once these issues have been given fuller consideration.

27. Thus, to the extent that COMSAT acquires any indirect interest in the Affiliate by reason of Inmarsat's investment in the Affiliate, we are ordering COMSAT to apply to the Commission for authority to participate in any procurement by the Affiliate of facilities that will be used to provide Inmarsat services. The Application shall be filed at least sixty days before the Affiliate's Board of Directors makes any final decision to procure the facilities in question, and in any event not later than May 1, 1995. In addition to the information normally included in COMSAT's procurement applications, COMSAT shall include the organic documents of the Affiliate, an analysis of the extent to which the Affiliate's facilities decisions affect Inmarsat ratepayers, a demonstration of the Affiliate's structural compliance with the *Inmarsat-P Declaratory Ruling,* and an outline of the extent to which the Affiliate is or should be subject to Commission oversight beyond that for which the Communications Act provides.

CONCLUSION

28. Accordingly, IT IS ORDERED that TRW's Emergency Motion for Temporary Relief is hereby DENIED.

29. IT IS FURTHER ORDERED that, to the extent that COMSAT acquires any indirect interest in the Affiliate by reason of Inmarsat's investment in the Affiliate, COMSAT must apply to the Commission for authority to participate in any procurement by the Affiliate of facilities that will be used to provide Inmarsat services. The Application, prepared in accordance with paragraph 27 of this Order, shall be filed at least sixty days before the Affiliate's Board of Directors makes any final decision to procure the facilities in question, and in any event not later than May 1.

30. IT IS FURTHER ORDERED that this Order be effective upon its adoption on January 6, 1995.

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

[33] Motorola Comments at 4-6.

[34] COMSAT Opposition at 8 n.6; COMSAT Response to Motorola at 2-3. COMSAT also notes the practical problem that would be created by evaluating any investment in the Affiliate now, since the kinds of technical facts about international satellite facilities that are normally considered by the Commission in procurement cases have not yet been developed by the Affiliate. COMSAT Response to Motorola at 3.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision of West Michigan, Inc. Vergennes, Michigan — CUID No. MI1502

Benchmark Filing To Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: December 30, 1994; Released: January 3, 1995

By the Chief, Cable Services Bureau:

INTRODUCTION

1. Here we consider a complaint about the price TCI Cablevision of West Michigan, Inc. ("TCI") was charging for its cable programming service ("CPS") tier in Vergennes, Michigan, CUID No. MI1502. TCI has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of TCI's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its rates through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

PROCEDURAL MATTERS

4. The first valid CPS complaint was completed and served on TCI on February 2, 1994. The Commission received the complaint on February 9, 1994.

5. TCI attempted to justify its CPS price through an FCC Form 393 filed on March 10, 1994. TCI amended its justification twice: on May 27, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally;[11] and on December 20, 1994 in response to a Commission letter citing still unresolved deficiencies in TCI's amended showing.[12]

DISCUSSION

6. In its amended benchmark filing of May 27, 1994, TCI calculated a maximum permitted price for the CPS tier of $10.96 per month. However, TCI's actual price for the CPS tier was $11.65 per month. Thus, TCI has failed to demonstrate that its price for the CPS tier was not unreasonable.

7. We will therefore set a price for this tier. In doing so we have found the following errors that require a recalculation of TCI's maximum permitted CPS price:

a. In Column G of Schedules A and C of Part III of its FCC Form 393, TCI did not correctly account for its income tax expense. By placing entries in these columns, TCI confirms that it is a tax-paying entity (i.e., a "C" corporation). However, TCI incorrectly calculated its income tax by simply applying the corporate tax rate to its return on investment. The Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent TCI has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which TCI implemented its CPS price under the new regulations. See para. 3, *infra*. Furthermore, to the extent that the price for the period ending May 14, 1994 is found to be excessive, reductions in TCI's price for the period after May 14, 1994 may be required to reflect the fact that TCI's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order*, MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *Second Order on Reconsideration;* 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526 (released May 23, 1994).

[12] Letter from Elias G. Johnson to Donald Stephan, TCI Cablevision of West Michigan, Inc. (Dec. 14, 1994).

Schedules A and C (i.e., calculate the tax as a percentage of return on investment plus tax).[13] By understating its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS price. We therefore recalculate Column G of Schedules A and C (and subsequent steps) using correctly grossed-up tax entries.

b. TCI's calculations for its rate-regulated package as of the initial date of regulation (Form 393, Part I, and Form 393, Part II, Worksheet 1) reflect 33 regulated channels and 26 satellite channels. Our examination of the channel line-up that TCI provided with its May 27, 1994 filing, however, reveals only 32 regulated channels and 25 satellite channels. TCI apparently incorrectly counted channel 21, identified as "Request 1 PPV," as a satellite channel and channel 48, identified as "PPV Events," as a satellite channel and a regulated channel. Pay-per-view channels, however, may not be counted as regulated channels or as satellite channels.[14] On the other hand, TCI apparently failed to count channel 32 as a satellite channel, even though this channel carried Pro Am Sports ("PASS") and Consumer News & Business Channel ("CNBC"), both of which are satellite delivered. Accordingly, we reduce the number of regulated channels by one and the number of satellite channels by one.

c. On Line 108 of Form 393, Part II, Worksheet 1, TCI entered a monthly franchise fee expense of $823.87. The instructions to Form 393 provide that franchise fees are to be deducted on Line 108 only if they are included in the charges listed on Form 393, Part II, Worksheet 1, Line 101. However, the rate card TCI provided with its May 27, 1994 filing indicates that the prices entered by TCI on Line 101, $9.70 for the basic tier and $11.65 for the CPS tier, do not include franchise fees.[15] Accordingly, we reduce TCI's Line 108 entry from $823.87 per month to $0.00 per month.

8. Because of these errors, we conclude that TCI has failed to demonstrate that its maximum permitted price for the CPS tier was not unreasonable. We will therefore set a maximum permitted price for this tier, incorporating the adjustments discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1, on the basis of the most accurate data currently available for the date as to which TCI filed.[16] On its amended Form 393, TCI calculated the Inflation Adjustment Factor as of the end of December 1993 using data released on December 1, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through December 1993, the base date TCI used in justifying its rates, of 1.034.

9. These adjustments have the cumulative effect of reducing the maximum permitted monthly CPS tier price from $10.96 (as TCI calculated) to $10.69.

CONCLUSIONS

10. Upon review of the record herein, we conclude that TCI's showing supports a maximum reasonable CPS tier price of $10.69 per month (plus franchise fee) for the period February 9, 1994 to May 14, 1994.[17] We further determine that we will order an appropriate refund pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

11. We further conclude that TCI must reflect in its Form 1200 rate filing for the period after May 14, 1994 the fact that TCI's prices during the earlier period were unreasonable.[18] We reserve the right to make further adjustments to TCI's prices forthe period after May 14, 1994, upon completion of our review of TCI's FCC Form 1200 rate filing.

12. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the February 2, 1994 complaint against the cable programming service price charged by TCI Cablevision of West Michigan, Inc. in Vergennes, Michigan, CUID No. MI1502, IS GRANTED TO THE EXTENT INDICATED HEREIN.

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[13] *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation"). *See also Cable Television Rate Regulation Questions and Answers Relating To FCC Form 393*, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment").

[14] *See General Instructions for Completing FCC Form 393*, Instruction No. 5 ("Cable programming service consists of all video programming distributed over a cable system that is not included in the basic service tier or offered on a per-channel or per-program basis"); *Instructions for Worksheet 1*, Line 121 ("For purposes of using the benchmark tables, a 'satellite-delivered signal' is any cable program service or 'superstation' delivered on a communications satellite that is not a premium service (pay channel or pay-per-view channel)").

[15] We also note that in Part I of its May 27, 1994 amended Form 393 filing TCI entered $9.70 per month as its current basic tier price and $11.65 per month as its current CPS tier price, exclusive of franchise fees. These entries provide further support that the prices entered on Line 101 do not include franchise fees.

[16] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[17] This finding is based solely on the representations of TCI listed in paragraph 5, *supra*, and the modifications described in paragraphs 7 and 8, *supra*. Should information come to our attention that these representations were inaccurate in any material way, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[18] We reviewed TCI's Form 1200 rate filing and confirmed that TCI calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

13. IT IS FURTHER ORDERED, that the benchmark filing submitted by TCI Cablevision of West Michigan, Inc. with respect to Vergennes, Michigan, CUID No. MI1502, for the period of February 9, 1994 to May 14, 1994, justifies a maximum price of $10.69 per month (plus franchise fee) for TCI Cablevision of West Michigan, Inc.'s cable programming service tier.

14. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. §76.961, that TCI Cablevision of West Michigan, Inc. shall refund to subscribers that portion of the amounts paid for cable programming service from February 9, 1994[19] to May 14, 1994, that exceeded $10.69 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

15. IT IS FURTHER ORDERED, that TCI Cablevision of West Michigan, Inc. shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 30 days of Commission approval thereof.

16. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that TCI Cablevision of West Michigan, Inc. shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to its Vergennes, Michigan franchise area, CUID No. MI1502, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price for that franchise area (plus franchise fee).

17. IT IS FURTHER ORDERED, that TCI Cablevision of West Michigan, Inc. shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price for its Vergennes, Michigan franchise area, CUID No. MI1502, that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[19] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission.47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

INSIGHT COMMUNICATIONS COMPANY
OF NEW YORK, INC.

Petition for Reconsideration

of the Certification of
Salt Lake County, UT (UT0157)
to Regulate Basic Cable Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1994; Released: December 19, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On December 18, 1993, Insight Communications Commission of New York ("Insight") filed a timely petition for reconsideration challenging the certification of Salt Lake County, Utah ("Salt Lake") to regulate rates for basic cable service and associated equipment.[1] On August 4, 1994, Insight filed a response to a Bureau request for additional information.[2] Salt Lake did not file an opposition to Insight's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless the franchise authority has actual knowledge to the contrary.[4] Such certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days of the date such certification becomes effective.[6] Regulation of rates is automatically stayed pending review of a timely filed petition for reconsideration alleging effective competition.[7]

II. DISCUSSION

3. Insight argues that its system serving, the unincorporated areas of Salt Lake County, its franchise area, is subject to effective competition because the system serves fewer than 30 percent of the households within its franchise area.[8] Insight states that it serves 299 of the 96,131 "homes" in its franchise area, or .3 percent of the total number of "homes." As supporting documentation, Insight submits a copy of a household trend report prepared by the National Planning Data Corporation which Insight uses to calculate a 1992 estimate of 96,131 "housing units" in the unincorporated areas of Salt Lake County.[9] In addition, Insight provides a computer printout which indicates that it serves 299 subscribers. Insight's supplemental pleading also contains 1990 Census and 1992 estimate household (i.e. occupied housing unit) data.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[10] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within its franchise area.[11] Based on all of the evidence before us, we find that Insight has met this burden.

5. We note that Insight initially based its arguments on incorrect housing data. In its initial filing, Insight based its effective competition claim on "housing unit" (occupied and vacant) data. Our rules, however, require the use of

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[1] Salt Lake filed its Certification of Franchising Authority to Regulate Basic Cable Rates and Initial Finding of Lack of Effective Competition (FCC Form 328) on November 24, 1993. Its certification became effective on December 24, 1993.

[2] Letter to Insight Communications, Inc. dated July 26, 1994.

[3] Communications Act of 1934 § 623 (a)(4), 47 U.S.C. § 543(a)(4).

[4] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[7] 47 C.F.R. § 76.911(c).

[8] The Cable Act (Communications Act of 1934 § 623 (a)(2), 47 U.S.C. § 543 (a)(2)) and the Commission's rules (47 C.F.R. § 76.905 (a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases on which a cable system is deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the cable service of the system. Communications Act of 1934, § 623 (l)(1)(A), 47 U.S.C. §543 (l)(1)(A); 47 C.F.R. § 76.905 (b)(1).

[9] Insight submitted a copy of National Planning Data Corporation's household trend report for the entire Salt Lake County as well as for each incorporated area within Salt Lake County. Insight took the total 1992 estimated number of housing units for Salt Lake County (265,835) and subtracted the total 1992 estimated number of housing units for Bluffdale City (505), Riverton City (3,044), South Jordan City (3,083), West Jordan City (12,562), Alta Town (181), Sandy City (21,251), Salt Lake City (74,000), Draper City (1,744), Midvale City (5,033), Murray City (12,886), South Salt Lake City (5,050), Little Cottonwood Creek (1,645), and West Valley City (28,720) to arrive at a total of 96,131 housing units for the unincorporated areas of Salt Lake County.

[10] 47 C.F.R. § 76.906.

[11] 47 C.F.R. § 76.911(b)(1).

data reflecting the number of "households" (*i.e.*, occupied housing units) in the franchise area. *See Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*).[12] Nonetheless, Insight's supplemental pleading does contain 1990 Census and 1992 estimated households (*i.e.*, occupied housing unit) data, prepared by National Planning Data Corporation. According to the 1990 Census data[13] there are 87,743 households (that is, occupied housing units) and according to the 1992 estimates[14] there are 91,135 households (that is, occupied housing units) in the relevant franchise area. A comparison of the number of subscribers (299) in relation to either household figure 87,743 (1990 Census data) or 91,135 (1992 estimates) yields a penetration level of .34 percent or .33 percent, respectively. In either event, the penetration level is well below 30 percent. Thus, we find that Insight's cable system serving the unincorporated areas of Salt Lake County, Utah is subject to effective competition. Accordingly, its petition is granted.

III. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Insight Communications, Inc. challenging the certification of Salt Lake County, UT to regulate Insight's basic cable rates IS GRANTED.

7. IT IS FURTHER ORDERED that the certification filed by Salt Lake County, UT to regulate Insight's basic cable rates IS RESCINDED.

8. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's rules, as amended, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[12] As the Commission stated in the *Third Recon. Order*, "[a]s used in the Cable Act, we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units or even partial year vacant units." *Third Recon. Order, supra*. The term "household" is defined for purposes of the 1990 Census data as "all the persons who occupy a housing unit." Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. Thus, the term reflects only occupied housing units. The term "housing unit," however, was defined by the Census Bureau to include both occupied and vacant housing units.

[13] Using the 1990 Census figures, the total number of households in Salt Lake County is 240,680. This number is reduced by the number of households in Bluffdale City (540), Riverton (2,745), South Jordan City (2,829), West Jordan City (11,143), Alta Town (52), Sandy City (19,423), Salt Lake City (66,657), Draper City (1,373), Midvale City (4,630). Murray City (11,712), South Salt Lake City (4,421), Little Cottonwood Creek Valley (1,479) and West Valley City (25,933). This yields a total of 87,743 households in the unincorporated areas of Salt Lake County.

[14] The total estimated 1992 number of households in Salt Lake County is 249,173. This number is reduced by the number of households in Bluffdale City (483), Riverton City (2,954), South Jordan City (3,025), West Jordan City (12,032), Alta Town (56), Sandy City (20,558), Salt Lake City (67,063), Draper City (1,626), Midvale City (4,695), Murray City (12,243), South Salt Lake City (4,493), Little Cottonwood Creek Valley (1,565), and West Valley (27,245). This yields 91,135 1992 estimated households in the unincorporated areas of Salt Lake County.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
December 19, 1994

Released: December 20, 1994

Gardner F. Gillespie
Hogan & Hartson
Columbia Square
555 Thirteenth St., N.W.
Washington, D.C. 20004-1109

File Number: LOI-93-10

Dear Mr. Gillespie:

On November 17, 1993, the Commission requested information from Mercom, Inc. ("Mercom") concerning, among other things, a la carte services offered by it in the City of Plainwell, Michigan. *Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Mr. Rob Ritzel, Manager, Allegan County Cablevision (Mercom)*, LOI-93-10 (November 17, 1993). The inquiry was prompted by a letter from the City of Plainwell that questioned Mercom's practice of moving channels from rate-regulated cable programming service tiers to packages of a la carte channels.

In a letter to the Cable Services Bureau dated October 11, 1994, the City of Plainwell sought to withdraw its Form 329 rate complaint filed against Mercom. The City stated in that letter that it had completed its review of Mercom's rate justification and had resolved the issue of whether Mercom's a la carte service offerings are rate-regulated. In an *Order* released December 12, 1994, the Cable Services Bureau granted the City's request to withdraw its complaint against Mercom. *Memorandum Opinion and Order*, DA 94-1440 (Cable Services Bureau, December 12, 1994). In addition to granting the City's request, the *Order* terminated the Bureau's review of the rate justification proceeding initiated by the complaint. There is now neither a valid rate complaint nor a pending rate case respecting Mercom in the City of Plainwell. Moreover, the City has requested, by letter dated October 11, 1994, that the Commission discontinue its investigation into the issues set forth in the Letter of Inquiry referenced above. Under all these circumstances, we believe that the public interest is not served by our continuing the inquiry of Mercom initiated by Letter of Inquiry 93-10. Accordingly, we hereby terminate that inquiry.

Sincerely,

Meredith J. Jones
Chief, Cable Services Bureau

cc: John Pestle
Rob Ritzel
Ruth A. King

Before the
Federal Communications Commission
Washington, D.C. 20554

In re the Application of

MCI COMMUNICATIONS CORPORATION,
Transferor,

and

SOUTHERN PACIFIC TELECOMMUNICATIONS CORPORATION,
Transferee,

File No. ENF-94-006

For Consent to
Transfer Control
of Qwest Communications, Inc.

File No. 9413177

MEMORANDUM OPINION AND ORDER

Adopted: December 27, 1994; Released: December 28, 1994

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In this order we address the above-captioned application of MCI Communications Corporation ("MCI") and Southern Pacific Telecommunications Company ("Southern"), which seeks Commission consent to transfer control of Qwest Communications, Inc. ("Qwest") from MCI to Southern, pursuant to Section 310(d) of the Communications Act of 1934, as amended ("Act").[1] We conclude that the record of this proceeding presents no substantial and material questions of fact and that the proposed transaction will serve the public interest. We, therefore, grant the application.

II. BACKGROUND

2. Qwest provides domestic interexchange telecommunications services, through its digital microwave transmission network and interconnection with other carriers, to customers located throughout the eastern, southern, and midwestern United States. As part of its network, Qwest holds 155 Common Carrier Point-to-Point Microwave Radio Service licenses.[2] MCI,[3] the sole shareholder, owns and controls Qwest.

3. MCI has entered into an agreement ("Agreement")[4] to sell Qwest to Southern, a closely held Delaware corporation that provides domestic long-distance transmission services and facilities to interexchange carriers and commercial businesses.[5] Pursuant to the Agreement, Southern is to pay MCI approximately $20 million for all of the issued and outstanding shares of the capital stock of Qwest, thereby transferring control of Qwest from MCI to Southern. In addition, within two years of closing, MCI has committed to order $3.5 million of private line telecommunications services from Qwest. Further, for a period of one year after the sale of Qwest to Southern, MCI has agreed that it will neither solicit nor accept orders from a Qwest customer if Qwest provides such customer the same telecommunications service between the same cities.[6]

4. On March 18, 1994, MCI and Southern ("Applicants") filed the above-captioned application for Commission consent to transfer control of Qwest from MCI to Southern. The Commission gave public notice of the application on April 6, 1994,[7] and Microwave Acquisition Company (MAC)[8] timely filed a *Petition to Deny* on May 6, 1994.[9] The Applicants filed an *Opposition to Petition to Deny* on May 19, 1994, followed by MAC's *Reply to Opposition to Petition to Deny* on June 1, 1994. Thereafter, the Applicants filed a June 13, 1994, *Supplement to Opposition to Petition to Deny;* MAC filed a June 30, 1994, *Supplement to Petition to Deny;* and the Applicants filed a July 11, 1994, *Response to Supplement to Petition to Deny*. The Applicants also filed a July 26, 1994, letter from Cheryl A. Tritt and William J. Byrnes (counsel to Southern and MCI, respectively) to William F. Caton, Acting Secretary, Federal Communications Commission, and a November 1, 1994, letter from Cheryl A. Tritt and William J. Byrnes to A. Richard Metzger, Jr., Deputy Chief, Operations, Common Carrier Bureau. MAC also filed a November 7, 1994, letter from Donald J. Evans (counsel to MAC) to A. Richard Metzger, Jr. Generally, the "pleading cycle" in Commission proceedings consists of a petition, motion or request, followed by oppositions and then replies.[10] We accept the

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[1] 47 U.S.C. § 310(d).

[2] Part 21, subpart I, 47 C.F.R. §§ 21.700 - 21.713, contains rules for the Point-to-Point Microwave Radio Service.

[3] MCI provides interstate interexchange and international common carrier communications services and a variety of enhanced services in both the domestic and international markets through its subsidiaries, including MCI Telecommunications Corporation ("MCI Telecom").

[4] *See* "Stock Purchase Agreement Dated February 16, 1994" ("Agreement") attached as part of application Exhibit B. Southern initially requested that the Commission withhold the Agreement from public inspection, pursuant to 47 C.F.R. § 0.459, but later withdrew this request. *See* May 19, 1994, letter from Cheryl A. Tritt, Counsel for Southern, to William F. Caton, Acting Secretary, Federal Communications Commission.

[5] *See* Application, Exhibit C.

[6] *See* Agreement, §§ 8.3 and 8.4.

[7] Public Notice Report No. 1077, released April 6, 1994.

[8] MAC filed its petition in the name "Microwave Acquisition Corp." but later reported its correct name as "Microwave Acquisition Company, Inc." MAC Reply at 1, n.1.

[9] Public Notice Report No. 1079, released April 20, 1994, and No. 1099, released September 7, 1994, inadvertently listed the application as granted. Public Notice Report No. 1081, released May 4, 1994, and No. 1101, released September 21, 1994, noted these errors and clarified that the application "remains in a pending status."

[10] *See* 47 C.F.R. § 1.45.

additional pleadings filed by the parties, however, so that our determination on the application will be based on as complete a record as possible.

5. Pursuant to the terms of the Agreement, MCI also filed a second application for Commission consent to a *pro forma* assignment of 15 additional Point-to-Point Microwave licenses from MCI Telecom to its wholly-owned subsidiary Qwest (application file number 9413176). This second application was filed concurrently with the captioned application to transfer control of Qwest to Southern. Although *pro forma* assignment applications are not subject to the public notice and other requirements of Section 309 of the Act,[11] the Commission gave informational notice[12] of this secondapplication before granting it on April 11, 1994.[13] Section 21.11(d) requires consummation of assignments within 45 days of Commission approval.[14] On June 3, 1994, MCI Telecom requested waiver of this rule because, as reported on both applications,[15] the *pro forma* assignment was requested pursuant to the Agreement under review in the captioned application.[16] In view of these circumstances and the fact that the approved assignee is a wholly-owned subsidiary of the assignor, we waive Section 21.11(d) for the second, previously granted, application to the extent indicated in the ordering clause of the instant order.

III. DISCUSSION

A. Southern's Basic Qualification to be a Licensee

6. Section 310(d) of the Communications Act (the Act)[17] requires that the Commission find that the public interest, convenience and necessity will be served by the transfer of control of a company holding radio licenses. That determination requires the Commission to review, as may be appropriate, the citizenship, character, financial, technical and other qualifications of the transferee applicant.

7. Southern, an existing Commission licensee and interstate communications common carrier, states that its qualifications are a matter of public record and that it is committed to the continued provision of high quality service to the public. Specifically, if the Commission approves the transfer, Southern asserts that it intends to expand the quality and availability of services so that Qwest customers will be able to subscribe to Southern's WATS, 1 plus, 1-800, and Travel Card services. Qwest customers would also gain access to new video teleconferencing and construction-services programs.[18] Southern also certified that the subject facilities are constructed and operating in accordance with the Commission's Rules,[19] and the Commission's records indicate that Southern does not hold any common carrier authorizations for facilities that have not been constructed. Accordingly, if we approve the proposed transfer and MCI and Southern consummate the Agreement, Southern will not need to raise additional capital to construct facilities, as required under the Commission's Rules, to avoid license forfeiture.[20] MAC, the only entity that opposed the application, does not dispute Southern's basic financial or technical qualifications.

8. We conclude, based on the record of this proceeding, that Southern has the necessary financial resources and technical expertise to ensure that communications services provided by Qwest are consistent with the public interest. Accordingly, Southern satisfies the Commission's threshold qualification requirements. We also conclude, based particularly on Southern's construction certification, that the circumstances of the proposed transaction do not indicate "trafficking" in Commission licenses.[21]

B. MAC Petition to Deny

9. MAC, in brief, argues that the Commission should deny the application because the proposed Agreement may endanger the existence of small long-distance telephone carriers, and would substantially lessen competition in relevant geographic and product markets. MAC also contends that the application should be denied on procedural grounds. We address these issues below, as part of our public interest determination, after first reviewing MAC's standing to raise these objections.

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[11] *See* 47 U.S.C. § 309(b) and (c); 47 C.F.R. § 21.27(b)(5); *see also* 47 C.F.R. § 21.39(b).

[12] *See* 47 C.F.R. § 21.27(a)(5). The second application appeared on the same public notice that listed the captioned application. *See supra* note 7.

[13] Public Notice Report No. 1079, released April 20, 1994, announced this grant.

[14] *See* 47 C.F.R. § 21.11(d). The Commission must be notified by letter of the date of consummation of an assignment within 10 days of its occurrence. *Id.*

[15] Exhibit A of the captioned transfer application, for example, noted the simultaneously filed *pro forma* assignment application, listed the 15 additional licenses involved, and reported that under the Agreement the transfer of control of Qwest to Southern would include these 15 licenses.

[16] *See* June 3, 1994, letter from William J. Byrnes (counsel to MCI Telecom) to Federal Communications Commission, Common Carrier Radio Service.

[17] Section 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 310(d), provides generally that no radio construction permit, station license, or any rights thereunder shall be transferred without an application to the Commission and its finding that the public interest, convenience and necessity will be served by the proposed transfer. *See also* 47 C.F.R. § 21.38.

[18] *See* application Exhibit B (response to FCC Form 704, Questions 7 and 28) and application Exhibit I (statement of changes in response to FCC Form 704, Question 23).

[19] *See* application, responses to FCC Form 704, Questions 27(b) and 29(a). This fact is relevant to our disposition of this transfer application because applicants for new point-to-point microwave authorizations must demonstrate their financial qualifications by certifying that they have or will have the financial resources required to underwrite the expected costs of constructing the facilities within the time allowed and the estimated operating expenses for a period of twelve months after service commences. *See* FCC Form 704, Question 29(a), and 47 C.F.R. § 21.17.

[20] With a few exceptions, Point-to-Point Microwave Radio Service licenses are forfeited automatically if the authorized stations are not constructed and ready to operate within 18 months from the date of the original license grant. *See* 47 C.F.R. §§ 21.43, 21.44.

[21] Pursuant to 47 C.F.R. § 21.39 (considerations involving transfer or assignment applications), the Commission will review a proposed transaction to determine if the circumstances indicate "trafficking" in licenses if the facilities involved, *inter alia*, have not been constructed. *See* 47 C.F.R. § 21.39(b)(2).

10. *Standing*. Section 309(d)(1) of the Act[22] authorizes only parties in interest[23] to file petitions to deny. In this regard, the Applicants and MAC agree that MAC entered into a contract with MCI in 1992 for the purchase of Qwest.[24] This contract was never consummated and MAC asserts that it has filed an action in state court against MCI and Southern seeking monetary damages and specific performance. According to MAC, irreparable harm would result if Qwest is transferred to Southern rather than MAC because Qwest is a unique communications system that has no equivalent in the marketplace. MAC claims standing to petition to deny the captioned application based on this alleged injury.[25] The Applicants counter[26] that MAC does not have standing under the more recent precedent discussed below.

11. The courts have held that persons claiming standing must allege and prove three elements: (1) personal injury, (2) that is "fairly traceable" to the challenged action,[27] and (3) that there is a substantial likelihood that the relief requested will redress the injury claimed.[28] Taking MAC's pleaded facts as true, we find that the alleged injury to MAC is "fairly traceable" to MCI's asserted contract breach, not the Commission action that MAC opposes in this proceeding. Commission consent to the pending application does not require or cause the transfer of control of Qwest. Nor does such consent resolve the merits of MAC's contention that MCI breached its agreement with MAC.[29] Moreover, grant of the relief requested by MAC in this proceeding (*i.e.*, denial of the transfer) would not redress any injury caused by MCI's alleged breach. Rather, denial of the application would simply require MCI to remain in control of Qwest. By contrast, MAC can obtain redress for any injury caused by MCI's alleged breach in its state court action, since that court can order specific performance or other appropriate relief. The Commission has previously held that such contractual disputes should be resolved by a court of competent jurisdiction, not the FCC.[30] Further, MAC could seek injunctive relief in the state proceeding to prevent consummation of the transfer until the state court litigation has been concluded. For the foregoing reasons, we conclude that MAC does not have standing to file a petition to deny the proposed transfer of Qwest to Southern. Nonetheless, pursuant to 47 C.F.R. § 21.30(b), we will treat MAC's petition as aninformal objection and consider its arguments in making our public interest determination.[31]

C. Competitive Impact of the Agreement

12. Our examination of a transfer of control under the public interest standard of Section 310(d) of the Act includes consideration of the effect of the transfer on competition. Section 7 of the Clayton Act proscribes the acquisition of the stock or assets of a company by another company "where in any line of commerce in any section of the country" the effect of such acquisition may be "substantially to lessen competition, or to tend to create a monopoly."[32] Section 11 of that statute empowers the Commission to enforce Section 7 in the case of "common carriers engaged in wire or radio communications or radio transmissions of energy."[33] The courts have construed this to mean that the requirements of Section 11 of the Clayton Act and the applicable provisions of the Communications Act "are satisfied when the Commission seriously considers the antitrust consequences of a proposal and weighs those consequences with other public interest factors."[34]

13. We note at the outset that the U.S. Department of Justice and the Federal Trade Commission (FTC) had an opportunity to review the subject application as well as filings made by each of the Applicants pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976.[35] Neither governmental agency filed objections before the Commission to the proposed acquisition or otherwise questioned its lawfulness. Moreover, the Applicants report that the FTC has granted their request for early termination of the Hart-Scott-Rodino waiting period.[36]

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[22] *See* 47 U.S.C. § 309(d)(1).

[23] The test used to define a "party in interest" under § 309 is essentially the same test used to define standing, under 47 U.S.C. § 402(b), to appeal a Commission decision on an application to the courts. *See Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1000, n.8 (D.C. Cir. 1966); Telesis Corp., 68 FCC 2d 696, 698-99 (1978); Memorandum Opinion and Order, RM-2847, Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application (*"Standing MO&O"*), 82 FCC 2d 89, paras. 18-19 (1980).

[24] *See* MAC Petition at 4 and Reply at 16-19, Applicants Opposition at 5-14.

[25] *See* MAC Reply at 17-18. MAC relies primarily on *Granik v. FCC*, 234 F.2d 682 (D.C. Cir. 1956) (*"Granik"*), in support of its claim that it has standing to oppose the transfer to Southern. In that case, the parties opposing a license assignment had attempted to exercise an option to purchase a radio station from a licensee who thereafter applied to assign the license to another person. The petitioning parties brought an action in state court, and also filed a protest, pursuant to 47 U.S.C. § 309(c) (1955), against the Commission's grant of consent to the license assignment. The Commission concluded that the petitioners lacked standing to oppose the assignment, *see* 44 FCC 499 (1955), but the court of appeals reversed. *Granik*, however, is inapposite because Congress subsequently revised the relevant provisions of Section 309. *See* 47 U.S.C. §§ 309(b), (c), and (d). We assess MAC's claims to standing on the basis of the currently applicable statute and relevant FCC and judicial precedent.

[26] *See* Applicants' Opposition at 5-10.

[27] *See Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 261 (1977); *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978) (*"Duke Power"*); *California Ass'n of Physically Handicapped v. FCC* 778 F.2d 823, 825 (D.C. Cir. 1985) (*"California Ass'n"*) ("The challenged action must *cause* the injury.").

[28] *See id., Duke Power*, 438 U.S. 75, n.20, *California Ass'n*, 778 F.2d 827.

[29] The lawfulness or effect of the 1992 contract is not at issue before the Commission. *Compare Telephone and Data Systems v. FCC*, 19 F.3d 42 (D.C. Cir. 1994).

[30] *See, e.g.*, Metromedia Company, 3 FCC Rcd 595 (1988) (contractual problems should be asserted in state courts because those courts have the expertise to handle these types of disputes).

[31] We address herein MAC's substantive objections concerning the competitive impact of the proposed transfer (paras. 12-23) as well as its claims of procedural defects (paras. 24-33).

[32] 15 U.S.C. § 18.

[33] *Id.* § 21.

[34] *United States v. FCC*, 652 F.2d 72, 88 (D.C. Cir. 1980) (en banc); OTI Corp., 6 FCC Rcd 1611, para. 13 (1991). We have discretion whether to enforce Section 7 of the Clayton Act, *United States v. FCC*, 652 F.2d at 83. We decline to invoke our authority in this case based on the record of this proceeding. *Accord* Memorandum Opinion and Order, 9 FCC Rcd 5836, para. 7 and n.25 (1994).

[35] 15 U.S.C. § 18(a).

[36] *See* Applicants' Opposition at 25.

1. Relevant Market

14. The applicable judicial precedents direct that our Section 7 analysis begin with a determination of the relevant market in which competition may be threatened. For purposes of Section 7, we must delineate both the relevant product market (*i.e.*, the "line of commerce") and the relevant geographic market (*i.e.*, "section of the country").[37]

15. *Relevant Product Market.* MAC asserts that each terrestrial transmission technology, such as digital microwave, analogue microwave, and fiber, as well as service to small long-distance carriers, and service to Federal agencies, is a discrete product market.[38] The Applicants counter that interstate, interexchange telecommunications service is the relevant product market.[39]

16. Based on substantial evidence in the record, the Commission concluded in 1983 that telecommunications transmission media -- coaxial cable, terrestrial microwave, fiber optics, or satellite transponders and earth stations -- generally can be adjusted readily to provide virtually any interexchange telecommunication service efficiently.[40] The Commission also found that customers typically view such services as reasonably interchangeable and increasingly purchase bandwidth capacity, not a service for a specific type of transmission or a service provided by a specific transmission medium.[41] On the basis of these two findings, the Commission concluded that different transmission media do not demarcate different product markets.[42] More specifically, the Commission has determined that all domestic, interstate, interexchange telecommunications services, including specialized common carrier services,[43] comprise a single relevant product market.[44] Based on this precedent, the absence of any substantial evidence raising doubts about the validity of the Commission's 1983 findings, and our analysis of the record, we conclude that domestic, interstate, interexchange telecommunications services is the relevant product market for analyzing the competitive impact of the Agreement.

17. *Relevant Geographic Market.* MAC asserts that each city pair served by Qwest is a relevant geographic submarket of the nationwide market and that the proposed Agreement, when analyzed by each submarket, would substantially lessen competition. MAC adds that the Applicants, by limiting the geography covered by their non-compete agreement to city pairs where Qwest serves existing customers, have acknowledged that each city pair is a relevant submarket.[45] The Applicants counter that there is one nationwide geographic market for domestic interexchange telecommunications services, with no submarkets.[46] Based on this premise, the Applicants assert that the Agreement actually increases competition slightly.[47]

18. We are not persuaded by MAC's contention that each city pair is a relevant geographic submarket. As a preliminary matter, it does not follow that the geographical scope of the non-compete agreement identifies relevant submarkets because these provisions simply reflect that Qwest does not serve customers in every city pair in the nation. Relevant geographic markets, however, are not defined by the areas served by one of many market participants. The Commission, moreover, has previously concluded that the relevant geographic market for interstate, interexchange telecommunications services is national, with no relevant submarkets, because of supply substitutability and low entry barriers.[48] More to the point, as the Commission found in 1983, it would be inaccurate to segment the market into distinct city pairs or even domestic regions, as MAC suggests, because many networks have alternative routing capabilities with nationwide or near nationwide service areas.[49] We conclude thus that, in the absence of substantial evidence raising doubts about the validity of the Commission's earlier findings, the national market is the relevant geographic market for analyzing the competitive impact of the Agreement.

2. Market Power

19. The Commission's rules classify carriers as dominant or non-dominant based on their ability to exercise market power.[50] Because it lacks market power, a non-dominant carrier does not have the ability or incentive to price its services unreasonably, to discriminate among customers unjustly, to terminate or reduce service unreasonably, or to

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[37] *Brown Shoe Co. v. United States*, 370 U.S. 294, 324-25 (1962), *United States v. FCC*, 652 F.2d at 97, *supra* note 34.

[38] *See* MAC Petition at 11-18.

[39] Applicants' Opposition at 22.

[40] *See* Fourth Report and Order, CC Docket No. 79-252, Policy and Rules Concerning Competitive Carrier Services and Facilities Authorizations Therefor, 95 FCC 2d 554, para. 16 (1983) (*"Fourth Report"*), vacated, *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *rehearing en banc denied*, January 21, 1993, *cert. denied, MCI Telecommunications Corp. v. AT&T*, 113 S. Ct. 3020 (1993). In vacating the *Fourth Report*, the court invalidated the Commission's long standing "forbearance" policy under which non-dominant carriers were permitted to refrain from filing tariffs. In the *Fourth Report*, however, the Commission also made other determinations concerning interexchange carriers and the markets in which they compete. Those determinations were unaffected by the court's decision. *See* Notice of Proposed Rule Making, CC Docket No. 93-36, Tariff Filing Requirements for Non-dominant Common Carriers, 8 FCC Rcd 1395, paras. 1 and 6 (1993) (*"Notice"*).

[41] *See Fourth Report* at para. 15, *supra* note 40.

[42] *Id.*

[43] *See Fourth Report*, at para. 17, n.33, *supra* note 40. Specialized common carriers provide terrestrial voice and data services in direct competition with the established telephone carriers. *See* First Report and Order, CC Docket No. 79-252, Policy and Rules Concerning Rates for Competitive Common Carriers Services and Facilities Authorizations Therefor, 85 FCC 2d 1, para. 79 (1980) (*"First Report"*); *see also* Contel Corporation and GTE Corporation, 6 FCC Rcd 1003, 1005 (1991).

[44] *See Fourth Report*, at para. 14, *supra* note 40.

[45] *See* MAC Reply at 13. *See* paragraphs 3 and 22 regarding the non-compete provisions of the Agreement.

[46] *See* Applicants' Opposition at 23-25. The Applicants also dispute certain of MAC's statements regarding the specific location of Qwest and Southern facilities. *Id.* at 27, n.31.

[47] *See* Applicants' Opposition at 23-25.

[48] *See Fourth Report*, at para. 26, *supra* note 40; *see also* GTE Corporation & Southern Pacific Co., 94 FCC 2d 235, 250 (1983).

[49] *See Fourth Report*, at para. 26, *supra* note 40. The Commission has noted, for example, the existence of several networks with "alternative routing capabilities, by which transmission capacity between points A and B often can be used in providing service between points C and D. The cost of alternative routing may be similar to that of direct routing." *Id.*

[50] A carrier is classified as non-dominant unless the Commission has previously found it to be dominant. *See* 47 C.F.R. § 61.3(t) (definition, non-dominant carrier); *see, e.g., Notice* at para. 11, n.30, *supra* note 40.

overbuild its facilities.[51] After analyzing the domestic interexchange telecommunications services market, the Commission concluded in 1980 that specialized common carriers, such as MCI Telecom, Southern and Qwest, are non-dominant carriers.[52]

20. While a high market share alone does not necessarily demonstrate market power, market share is one key factor in determining market power, and a small market share does suggest the absence of market power.[53] Qwest is currently owned by MCI,[54] the nation's second largest interstate, interexchange carrier with a 17.9 percent market share as measured by total toll service revenues among long-distance carriers.[55] According to the Applicants, Southern and Qwest's combined market share would be approximately 0.10 percent (0.001) of the market.[56] The Applicants also submitted an analysis of market concentration, before and after the proposed transaction, as measured by the Herfindahl-Hirschman Index ("HHI").[57] By this analysis, market concentration would actually decrease slightly if we approve the application and the Applicants execute the Agreement.[58] MAC attempts to refute this conclusion by suggesting that we deem Qwest to be an independent carrier, rather than wholly-owned by MCI. MAC alleges that Qwest was an independent carrier before MCI purchased it in 1992 and, according to MAC, MCI always intended to hold Qwest temporarily and sell it to MAC.[59] MAC provides no basis for this novel approach, however, and we likewise find no factual or legal basis. The record reflects that Qwest is an MCI subsidiary, and we note that the Commission's consent to MCI's acquisition of Qwest is a final action that is no longer subject to administrative or judicial review.[60]

21. MAC also asserts that we should not approve the Agreement because Southern has entered the "retail long-distance market" and, as such, is not a "carrier's carrier."[61] According to MAC, moreover, "[u]nless Qwest is acquired by an independent company [that does not compete for long-distance customers], small carriers will be forced to lease transmission capacity from a large national competitor, thus exposing themselves to predation by the large carrier [because they will have to divulge call volume and other usage data]."[62] MAC's allegations regarding future "predation" by Southern are, however, unsupported and amount to speculation. Further, if a carrier engages in unlawful anticompetitive conduct, the Commission's complaint process[63] provides an effective remedy for rectifying such violations of the Act. The Act, moreover, prohibits the Commission from considering whether the public interest would be served by transferring a licensee to a person other than the proposed transferee.[64]

3. Non-compete Provisions

22. We further conclude that MAC has failed to sustain its claims that the non-compete provisions of the Agreement (noted in paragraph 3 above) constitute an illegal restraint of trade or are otherwise contrary to the public interest. The Commission has recognized the acceptability of covenants not to compete where the restraint is: 1) ancillary to the sale of a business; 2) designed to prevent a seller with an ongoing, competing business from impairing the value of the property or business sold by immediately attracting the existing customers of the transferred business; and 3) reasonably limited as to duration and geographic scope.[65] Based on the Agreement submitted by the Applicants, we find that the sole restraint on MCI is ancillary and incidental to the lawful purpose of selling the existing Qwest operation to Southern. It assures Southern that MCI will not seek to attract existing Qwest customers before Southern establishes its relationship with those customers as part of the ongoing Qwest business. Specifically, we find in the circumstances of this transaction that the one-year duration of the non-compete agreement is reasonable. We further find that restricting the scope of the prohibition to telecommunications services to Qwest customers, as of the closing date and only between the same city-pairs that the customers are currently served by Qwest, is a reasonable limitation.[66] MCI is free to seek to provide service to existing Qwest customers between points that the customers do not currently receive service from Qwest. MCI also may compete immediately to serve any customers not currently serviced by Qwest. It is also noteworthy that MCI would not be required to compensate Southern for serving an otherwise "off-limits" Qwest customer if such customer leaves Qwest because Southern/Qwest does not deliver service "consistent with a level of network performance previously provided such customer" by MCI/Qwest.[67]

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[51] *See First Report* at para. 55, *supra* note 43; *see also Fourth Report* at paras. 7-8, *supra* note 40.

[52] *See First Report* at paras. 79-81, *supra* note 43. The Commission later clarified that the treatment of specialized common carriers in *Competitive Carrier*, see *infra* note 95, was not limited to the five carriers named in the *First Report*. *See Fourth Report* at para. 1, n.2, *supra* note 40.

[53] *See, e.g., Fourth Report* at para. 31, *supra* note 40; Notice of Proposed Rule Making, CC Docket No. 90-132, Competition in the Interstate Interexchange Marketplace, 5 FCC Rcd 2627, para. 50 (1990); Report and Order, CC Docket No. 90-132, 6 FCC Rcd 5880, para. 51 (1991).

[54] *See supra* para. 2.

[55] *See* Long Distance Market Shares: First Quarter, 1994, released July 10, 1994, by the Commission's Industry Analysis Division, Common Carrier Bureau, Mimeo No. 43807, at Table 5.

[56] *See* Applicants' Opposition at 24. The Applicants included in this calculation the 15 stations to be assigned from MCI Telecom to Qwest. *Id. See also supra* para. 5.

[57] The HHI is the sum of the squares of the percentage market share of each firm. *See* 1992 Horizontal Merger Guidelines adopted jointly by the U.S. Department of Justice and the Federal Trade Commission, 57 FR 41552 (September 10, 1992).

[58] *See* Applicants' Opposition at 24-25.

[59] *See* MAC Reply at 15 and Petition at 12, n.5.

[60] *See* 47 U.S.C. §§ 402(c) and 405(a); 47 C.F.R. § 1.106(f).

[61] *See* MAC Reply at 15-16.

[62] MAC Petition at 13-14.

[63] *See* 47 U.S.C. § 208; 47 C.F.R. §§ 1.720-735.

[64] *See* 47 U.S.C. § 310(d).

[65] *See* Raul Santiago Roman, 38 FCC 290, 294 (Rev. Bd. 1965); *see also* Nirvana Radio Broadcasting Corporation, 4 FCC Rcd 2778, 2779 (Rev. Bd. 1989).

[66] *See also supra* para. 18.

[67] *See* Agreement, § 8.4(ii).

4. Conclusion -- Competitive Impact

23. We find no basis for MAC's assertions that transferring control of Qwest from MCI to Southern would harm competition. Consequently, we conclude, based on the record, that approval of the proposed transfer of control will not substantially lessen competition.

D. Procedural Matters

24. *Completeness of Answer to FCC Form 704, Question 7.* An application is unacceptable for filing and may be dismissed if the applicant's answers to questions are incomplete.[68] FCC Form 704 required the Applicants to file "a statement on how control is to be transferred, and copies of any pertinent contracts, agreements, instruments, certified copies of Court Orders, *etc*".[69] MAC asserts that the captioned application is defective because the Applicants did not file copies of exhibits and schedules, such as their non-compete agreement, that are referenced in the Agreement.[70]

25. We disagree and are satisfied that the record of this proceeding is sufficient for us to reach a determination. First, the 56 page Agreement submitted by the Applicants as part of the application reflects that the Applicants would execute ancillary agreements at closing. Second, the material terms of the ancillary agreements that are relevant to our determination are summarized in the Agreement. Third, under the Agreement, the Applicants would be bound contractually to execute such ancillary agreements "substantially similar to the form" of the summary that is a part of the record.[71] Fourth, we are satisfied that these summaries remain accurate because the Applicants have not filed any amendments reporting modifications, and applicants are required to furnish additional or corrected information to the Commission promptly if their pending application is no longer substantially accurate and complete in all significant respects.[72]

26. *Delegated Authority.* The Commission announced over two years ago that its Private Radio Bureau offices in Gettysburg, Pennsylvania, would assume responsibility for processing Common Carrier Point-to-Point Microwave applications.[73] The Commission clarified that while routine functions would be handled by the Gettysburg offices, the Commission's Washington, D.C. offices of the Common Carrier Bureau would continue handling all non-routine applications and requests, including petitions to deny that raise other than technical or interference issues. The Commission subsequently amended Parts 0 and 21 of its rules to provide that Point-to-Point Microwave Service applications, correspondence and amendments not requiring filing fees must be submitted to: Common Carrier Radio Services, 1270 Fairfield Road, Gettysburg, PA 17325.[74]

27. Pursuant to these procedures the Private Radio Bureau received the captioned application, assigned a file number, reviewed the application preliminarily and determined that it appeared complete. Thereafter, the Private Radio Bureau listed the captioned application as accepted for filing on a public notice, performed other ministerial tasks, and referred it to the Common Carrier Bureau after receiving MAC's petition.[75]

28. MAC asserts that the Private Radio Bureau did not have delegated authority to process the application because "[n]owhere has the Commission delegated to the [Private Radio Bureau] or the Chief of the [Private Radio Bureau] the authority to act on Part 21 common carrier applications such as the one presented here."[76] MAC claims that because the Private Radio Bureau lacked such authority, preliminary processing of the application -- receipt, acceptability review, public notice, and the petition period -- must start anew.[77]

29. We are not persuaded by MAC's assertions in this regard. First, the Private Radio Bureau processed the captioned application pursuant to published, well-established rules and procedures.[78] Second, the Commission has recently confirmed that it delegated such authority to the Private Radio Bureau.[79] Third, had the Common Carrier Bureau performed this initial processing -- the result that MAC seeks -- our actions would have been the same as the Private Radio Bureau's: we would have found the application acceptable for filing and placed it on public notice.[80] Fourth, as specified in the published procedures noted above, the Common Carrier Bureau is considering the captioned application and MAC's petition.[81] Accordingly, we conclude that MAC's objections to our procedures for processing this application are without merit.[82]

30. *Public Notice.* MAC asserts that the public notice that announced the captioned application did not fairly apprise the public of all of the licenses involved in the proposed

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[68] *See* 47 C.F.R. § 21.20(a).

[69] *See* FCC Form 704, Question 7.

[70] *See* MAC Reply at 5-6.

[71] *See, e.g.*, Agreement, §§ 8.3 and 8.5.

[72] *See* 47 C.F.R. §§ 21.13(a)(5), 1.65.

[73] *See* Public Notice, Certain Processing of Digital Electronic Message Service and Common Carrier Point-to-Point Microwave to be Transferred to Gettysburg, Pennsylvania, DA 92-1190, released September 3, 1992 (*"1992 Processing Notice"*) (corrected and clarified by Public Notice, DA 92-1252); *see also* Public Notice, New Application Processing Practices in the Common Carrier Point-to-Point Microwave and Broadcast Auxiliary Services, 8 FCC Rcd 775 (1993).

[74] *See* Order, 8 FCC Rcd 2076 (1993) [amended, *inter alia*, 47 C.F.R. §§ 0.453 (public reference rooms), 1.1105 (schedule of charges for common carrier services), 21.6 (filing of applications, fees, and number of copies), and 21.303 (discontinuance, reduction or impairment of service)].

[75] *See* 47 C.F.R. § 21.26 (receipt of applications).

[76] MAC Petition at 10-11.

[77] *Id.* at 10.

[78] *See supra* para. 26. *See also* 47 C.F.R. § 0.332(f).

[79] "We note that the Private Radio Bureau . . . issues, under delegated authority, common carrier licenses for Part 21 domestic public fixed services." *See* Third Report and Order, GN Docket No. 93-252, Regulatory Treatment of Mobile Services [other dockets omitted], FCC 94-212, released September 23, 1994, para. 383 and n.708 (citing *1992 Processing Notice, supra* note 73).

[80] If we had determined that the application was unacceptable for filing, the previous actions would have been harmless error. The fact that the Private Radio Bureau assigned a file number and listed the application as accepted for filing on a public notice, would not bar us from dismissing it if we found the application defective or not in substantial compliance with the Commission's Rules. *See* 47 C.F.R. § 21.26.

[81] *See, e.g.*, 47 C.F.R. § 21.32 (consideration of applications).

[82] MAC agrees that the Chief of the Common Carrier Bureau has authority to grant or deny the application. *See* MAC Petition at 11, n.4; *see also supra* para. 11.

transfer.[83] The public notice identified the Commission file number (9413177), the current licensee's name (Qwest), a reference or "lead" license (WHO694), and the application type (transfer).[84] MAC claims that this notice was deficient because it did not list all 155 Qwest licenses. Consequently, MAC contends that the Commission must issue a new notice identifying all 155 Qwest licenses, and accept petitions to deny the application for 30 days thereafter.[85] The Applicants counter that the Commission's public notice did fairly apprise the public of all of the Qwest licenses involved.[86]

31. The authority that MAC cites does not support the contention that the notice was deficient. Those cases dealt with Commission notices that announced deadline dates for filing competing applications against previously-filed applications for either new licenses or enlarged service areas of existing licenses. These "cut-off" notices, however, did not identify all of the frequencies and service areas involved. The court ruled that such notices were insufficient because they did not specify all of the frequencies and service areas that would be foreclosed to competing applicants after the specified cut-off dates.[87]

32. In the instant case, by contrast, the notice did not establish a cut-off date to file competing applications for the frequencies and service areas covered by the 155 Qwest licenses, because the public did not have a right to file such applications for the authority granted by the Qwest licenses.[88] The sole purpose of the notice was to allow the filing of petitions to deny[89] the proposed transfer of control of Qwest. Thus, the notice would have been valid without listing any of Qwest's licenses. By giving notice of the application to transfer control of Qwest, the Commission fairly apprised the public of the pending proposal to transfer all of Qwest's licenses because a transfer of control, by definition, involves all Commission licenses held by the licensee identified on the notice.[90]

33. Finally, as noted in paragraph 5 above, the Commission also gave informational notice of the second, *pro forma* assignment application related to the Agreement. We reject MAC's various procedural assertions related to this second application because this second application was not subject to the public notice and other procedures that apply when control of a licensee is transferred to a new party.[91]

34. *Section 214*.[92] The Commission has granted non-dominant carriers blanket authority under Section 214 of the Act to construct or operate new telecommunications facilities, provided that they obtain all necessary Commission authorizations to use any radio frequencies associated with their networks.[93] The Commission previously has presented an extensive explanation of the legal authority[94] and policy determinations[95] that justify applying different requirements under Section 214 to dominant and non-dominant-carriers and we need not repeat them here.

35. MAC asserts, however, that the Commission's grant of blanket authority under Section 214 to non-dominant carriers is invalid in light of a recent U.S. Supreme Court opinion.[96] The Court ruled that the Commission's authority to modify[97] any tariff-filing requirement[98] does not include authority to make tariff filings permissive for all non-dominant long distance carriers.[99] MAC contends that this decision bars the approval of MCI/Southern's application until Southern "applies for and receives the certificate specified by Section 214.[100] The Applicants respond that the Court's opinion addresses the Commission's authority under Section 203 of the Act and does not address its authority under Section 214.[101]

36. MAC concedes that the Commission decision adopting Section 63.07 of its Rules "was never appealed" and was not before the Court in the *MCI* case.[102] The Commission's Section 214 rules and policies thus remain unaffected by the Court's opinion regarding the Commission's permissive detariffing policy.[103] We conclude that MAC's assertion concerning the validity of Section 63.07 does not raise a substantial and material question of fact. Rather, MAC's objection amounts to an impermissible collateral attack[104] on a Commission decision that is no longer sub-

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[83] *See* MAC Reply at 7 and Petition at 9. MAC relies on *Radio Athens, Inc. (WATH) v. FCC*, 40 F.2d 398, 404 (D.C. Cir. 1968) (statutory notice must be full and explicit notice); *Ridge Radio Corp. v. FCC*, 292 F.2d 770, 773 (D.C. Cir. 1961) (a cut-off notice must fairly advise prospective applicants what is being cut-off by the notice); Central Mobile Radio Phone Service, 65 FCC 2d 648 (1977) (the Commission declared invalid a grant made pursuant to a public notice that had not listed the frequencies associated with the application at issue). *See* MAC Petition at 9.

[84] *See* Public Notice Report No. 1077, released April 6, 1994. a

[85] *See* MAC Reply at 6-8 and Petition at 8-10.

[86] *See* Applicants' Opposition at 15-18.

[87] *See Ridge Radio*, 292 F.2d at 773, *supra* note 83.

[88] Transfer applications are not subject to competing applications. *See, e.g.*, 47 U.S.C. § 310(d).

[89] *See* 47 U.S.C. § 309(b), (d).

[90] Although not required to do so, the Commission lists one license to aid the public in researching and identifying the licenses held by an applicant.

[91] *See* 47 U.S.C. § 309(c)(2)(B).

[92] 47 U.S.C. § 214. Section 214 provides in part that: "[no] carrier shall undertake the construction of a new line, or shall acquire or operate any line . . . unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction and operation of such additional or extended line . . . ." 47 U.S.C. § 214(a).

[93] *See* 47 C.F.R. § 63.07 (special procedures for non-dominant domestic common carriers); Fifth Report and Order, 98 FCC 2d 1191, para. 16 and n.37 (1984); *Fourth Report* at para. 36, *supra* note 40.

[94] *See First Report*, at paras. 117-129, *supra* note 43.

[95] *See* Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252 (*"Competitive Carrier"*). *See Notice* at para. 1, n.3, *supra* note 40, for the procedural history of this proceeding.

[96] *See MCI Telecommunications Corp. v. AT&T*, 114 S. Ct. 2223 (1994).

[97] *See* 47 U.S.C. § 203(b)(2).

[98] *See id.* § 203(a).

[99] MAC Supplement to Petition at 2-3.

[100] *Id.* at 3.

[101] Applicants Response to Supplement to Petition at 1-2.

[102] *See* MAC Supplement to Petition at 2. MAC references the *Fourth Report*. *See also supra* note 95.

[103] *See Notice* at para. 6, *supra* note 40.

[104] *See, e.g.*, Memorandum Opinion and Order, MCI Telecommunications Corp. v. Pacific Northwest Bell Telephone Co., 5 FCC Rcd 216, para. 41, n.38 (1990), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam).

ject to administrative or judicial review.[105] Based on the record of this proceeding, we find that Southern is a non-dominant carrier, subject to the provisions of Section 63.07 of the Commission's Rules. We, therefore, deny MAC's objections that are based on Section 214 of the Act.[106]

IV. CONCLUSION

37. We conclude that the proposed transfer pursuant to the terms of the Agreement should provide significant benefits to the public. We find no basis in the record for concluding that consummation of the proposed transfer will have anticompetitive effects in the market for interstate interexchange telecommunications services. We further find that Southern is legally, technically, financially, and otherwise qualified to operate Qwest's licenses and that grant of this application for consent to transfer control of Qwest to Southern will serve the public interest. MAC is not a party in interest to this proceeding. Moreover, having reviewed its petition as an informal objection, we find that it raises no substantial and material questions of fact and that its objections to the proposed transfer are unfounded. Accordingly, we grant the proposed transfer of control of Qwest to Southern.

V. ORDERING CLAUSES

38. Accordingly, IT IS ORDERED, pursuant to 47 U.S.C. §§ 154(i), 154(j), 308, 309, and 310(d), and authority delegated in 47 C.F.R. § 0.291, that the captioned application of MCI Communications Corporation and Southern Pacific Telecommunications Corporation that seeks Commission consent to transfer control of Qwest Communications, Inc. from MCI to Southern IS GRANTED.[107]

39. IT IS FURTHER ORDERED that Section 21.11(d) is WAIVED for application file number 9413176 to the extent that the *pro forma* assignment approved by the Commission on April 11, 1994, must be completed no later than the completion deadline date applicable to the captioned application under § 21.11(f).

40. IT IS FURTHER ORDERED that the May 6, 1994, *Petition to Deny*, as supplemented, filed by Microwave Acquisition Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

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[105] *See* 47 U.S.C. §§ 402(c) and 405(a); 47 C.F.R. § 1.429(d).

[106] For the purpose of this proceeding, we assume, without deciding, that Section 214 applies to the captioned application. *But see* Second Report and Order, GN Docket No. 93-252, Regulatory Treatment of Mobile Services, 9 FCC Rcd 1411, para. 165, n.335 (1994) (citing Memorandum Opinion and Order, Transamerican Microwave, Inc., 9 FCC 2d 159, 10 RR 2d 975 (1967)) (finding Section 214 inapplicable to an application where radio authorizations covered the entire use to which the service would be put).

[107] FCC Form 732, the license instrument that records this grant, will carry the adoption date of the instant order and list 170 licenses: the 15 licenses covered by the *pro forma* assignment application (file no. 9413176) granted on April 11, 1994, and the 155 licenses that Qwest already held when the Applicants filed the captioned transfer application. *See paras.* 1-5.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Group W Radio, Inc.,
Licensee of Radio Station WMAQ(AM),
Chicago, Illinois

Complaint of Phillip Goldberg

MEMORANDUM OPINION AND ORDER

Adopted: January 6, 1995; Released: February 3, 1995

By the Commission:

1. The Commission has before it for consideration an application for review filed on June 18, 1992, by Phillip Goldberg. The applicant appeals from the January 7, 1992, action of the Mass Media Bureau closing its investigation into allegations that WMAQ(AM), Chicago, IL, had violated Section 73.1216 of the Commission's Rules by conducting its 1991 "Grand Slam Sweepstakes" in a misleading and deceptive manner.[1]

2. In May 1991, Mr. Goldberg filed a complaint alleging that the material terms of WMAQ's Grand Slam Sweepstakes were misleading or not fully disclosed. Among other things, Mr. Goldberg asserted that the odds of winning had been overstated and that the announced contest prize of "$1 million cash" gave the false impression that a single cash payment, not installment payments, would be made. In response to a letter of inquiry from the Mass Media Bureau, Enforcement Division, Group W submitted a letter dated October 14, 1991, addressing the issues raised in the complaint. Mr. Goldberg filed a rebuttal to Group W's answer. After review of all this correspondence, the Division advised the parties, by letter to Group W dated January 7, 1992, with a copy to Mr. Goldberg, that there was "insufficient evidence supporting an allegation that information aired regarding the nature of the [Grand Slam Sweepstakes] prize to be awarded included false or misleading facts."

3. Since that time, Mr. Goldberg has written to the Commission several times protesting the decision to close this case and demanding a detailed explanation of how such a conclusion was reached.[2] On June 18, 1992, he filed a formal application for review of "the referenced complaint, written argument and conclusions reached by delegated authority."[3] The Mass Media Bureau supplemented its dismissal letter with a January 3, 1994, letter of explanation addressed to Mr. Goldberg. By letter dated January 5, 1994, Mr. Goldberg has expressed his dissatisfaction with the reasoning provided and his continued interest in Commission review of this matter.

4. Section 1.115(b)(2) of our Rules requires that an application for review "shall specify with particularity, from among the following, the factor(s) which warrant Commission consideration of the questions presented." The rule then lists five grounds that may be used for seeking review:

> (i) The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy.
>
> (ii) The action involves a question of law or policy which has not previously been resolved by the Commission.
>
> (iii) The action involves application of a precedent or policy which should be overturned or revised.
>
> (iv) An erroneous finding as to an important or material question of fact.
>
> (v) Prejudicial procedural error.

47 C.F.R. § 1.115(b)(2).

5. The instant application for review is procedurally deficient, because it fails to rely upon any of the above factors as a basis for Commission consideration of the questions presented. Instead, the applicant states that he seeks review "to bring this matter to closure."

6. Mr. Goldberg's dissatisfaction with the outcome alone does not provide an adequate basis to support an application for review. In addition, we see no reason to disturb the Mass Media Bureau's proper exercise of prosecutorial discretion in concluding that no further agency action was warranted. Such a dismissal is a fully acceptable way of bringing a matter "to closure."

7. Nevertheless, addressing the substance of Mr. Goldberg's application for review and his January 5, 1994, letter, we agree with the Mass Media Bureau's decision that the evidence it had accumulated did not support a finding that Group W had violated 47 C.F.R. § 73.1216 in its conduct of the Grand Slam Sweepstakes contest. In this regard, we have specifically reviewed the Bureau's reasoning as detailed in its January 3, 1994, supplemental letter to Mr. Goldberg, and we incorporate that letter herein by

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[1] 47 C.F.R. § 73.1216 states:

A licensee that broadcasts or advertises information about a contest it conducts shall fully and accurately disclose the material terms of the contest, and shall conduct the contest substantially as announced or advertised. No contest description shall be false, misleading or deceptive with respect to any material term.

[2] Mr. Goldberg's FOIA request was fully addressed and disposed of in a May 28, 1992, letter from the Chief of the Mass Media Bureau. We have reviewed the Bureau's letter and concur in its disposition of this matter. To the extent Mr. Goldberg alleged that improper or undisclosed *ex parte* contacts may have contributed to the Enforcement Division's decision in this case, no *ex parte* restrictions apply to informal complaints such as the one at issue here. *See* 47 C.F.R. §§ 1.1202(e) and 1.1204(a)(1).

[3] By letter dated June 26, 1992, Group W responded to the application for review and urged that it be dismissed because it was not timely filed within 30 days from the date of the January 7, 1992, dismissal letter. *See* 47 C.F.R. §§ 1.104(b), 1.115(d), and 1.4(b)(5). We decline to take this course of action, however, since it appears that Mr. Goldberg's earlier correspondence indicated within 30 days of the dismissal letter his desire to seek some kind of reconsideration of the matter.

reference. Its pertinent conclusions can be summarized as follows: (a) the prize description of "$1 million cash" was not misleading or deceptive so as to constitute a violation of our rule, since all the game cards and many of the contest announcements were clear about installment payments; (b) the possible ambiguity concerning the number of installments did not amount to a violation of our rule because in context it was, at worst, merely confusing, without attempting to supplant the $1 million prize figure that was so prominently publicized; (c) Mr. Goldberg's allegations of improprieties in the selection of winning numbers and distribution of game pieces were speculative and were not supported by record evidence; (d) the station's arrangements with a third party to pay the grand prize were not required to be revealed as long as the station took full responsibility to ensure that the full amount was paid to a winning contestant had one been selected; and (e) the odds of winning were not, in these circumstances, a material term requiring disclosure under our rule, and thus the issue of the accuracy of such statements is not relevant.

8. Accordingly, IT IS ORDERED that, pursuant to Section 1.115(g) of the Commission's Rules, the application for review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
January 3, 1994

IN REPLY REFER TO:
1800C1-MD
92030217
CM93-0927

Mr. Phillip Goldberg
4512 North Monitor Avenue
Chicago, IL 60630-3335

Dear Mr. Goldberg:

In response to your June 17, 1992, application for review of our disposition of your complaint concerning WMAQ's Grand Slam Sweepstakes contest, we are providing the following further information so that, if you elect to seek review, you will be able to specify which of the factors listed in 47 C.F.R. § 1.115(b)(2) (enclosed) you believe warrant Commission consideration.

Our January 7, 1992, ruling that no further action was warranted with respect to your complaint was based on a thorough review of all of your submissions as well as the one submitted by Group W on behalf of WMAQ. After evaluating all the material before us, we conducted no further investigation because we did not agree with you that the factual circumstances you described, even if verified, would constitute a violation of 47 C.F.R. § 73.1216.

You alleged that the prize description of "$1 million cash" was misleading or deceptive because the prize was intended to be paid, not in one lump sum, but in a number of installments. We believe that, since all the game cards necessary for entering the contest (as well as many of the contest announcements) were clear about installment payments, but disagree that the use of the word "cash" was, at worst, puffery which did not rise to the level of deception that our contest rule was designed to prohibit.

You also alleged that the number of installments mentioned in the contest literature was inaccurate. We agree with you that the literature could have been more clear on the point of an immediate payment preceding 39 installments, but disagree that this omission constitutes a violation of our rule. If payments to a winner had stopped prior to the distribution of $1 million, we would consider this to be a violation.

You further alleged that there may have been improprieties in the way the winning numbers were selected and the way the game pieces were distributed. We considered these allegations to be merely speculative and saw no reason to pursue these issues. We do not require that station-conducted contests be verified by independent judging firms.

You also alleged that game rules did not make it clear who would be responsible for payment of the grand prize. As long as the station conducting the contest, or claiming to be conducting the contest, takes full responsibility for delivery of the prize to the winner, the other parties that may be involved in making the payments are not of concern to us.

You also alleged that WMAQ inaccurately described the odds of winning the grand prize. You claim that the odds were actually 1 in 400,000,000, instead of "25 in 1,000,000" (or 1 in 40,000). You believe this inaccuracy misled contestants with respect to important information that might have affected their decision to participate. We do not agree that, under the circumstances of this contest, the odds of winning was a material term that was required to be disclosed under our rules. Accordingly, we did not evaluate your claim in this regard.

You also objected to the game brochure's simplified statement of a prize winner's obligation to pay federal and state taxes. Our rules do not require that any statement whatsoever regarding tax liability be included.

I trust that the foregoing is informative. Please note that this letter is also responsive to your December 2, 1993, letter to Chairman Hundt. If you wish to have the Commission review this matter based on the facts presented herein, please file your application within 30 days of the date of this letter in accordance with the rules enclosed for your convenience.

Sincerely,

Norman Goldstein, Chief
Complaints and Investigations Branch
Enforcement Division
Mass Media Bureau

Enclosure

cc: Group W

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-591

In re Applications of

NANCY NALESZKIEWICZ — File No. 10494-CL-P-430-A-89

For a Construction Permit to establish a new cellular system to operate on Frequency Block A in the Domestic Public Cellular Telecommunications Radio Service to serve the Kansas - 3 (Jewell) Rural Service Area

MEMORANDUM OPINION AND ORDER

Adopted: January 27, 1995; Released: February 3, 1995

By the Commission:

1. We have before us an application for review of the Review Board's final decision in this case, 8 FCC Rcd 2777 (1993), filed on May 26, 1993 by Nancy Naleszkiewicz.[1] The appellant contends that the Board erred in finding her disqualified on character grounds.

2. Nancy Naleszkiewicz was tentatively selected by lottery as the authorized provider of domestic public cellular radio service in the Kansas 3 Rural Service Area (RSA), but final disposition of her application has been postponed pending resolution of hearing issues concerning her character qualifications. The primary factual issue framed by the HDO is whether Nancy Naleszkiewicz was an accomplice to criminally fraudulent acts perpetrated against clients of Genesis Enterprises, Ltd., a business firm of which she and her husband are the sole stockholders. 5 FCC Rcd 7131, 7136-37 ¶ ¶ 48-49, 7138 ¶56 (CCB 1990). A related issue is whether Mrs. Naleszkiewicz was culpably involved in the filing of "Petitions for Inclusion" on Genesis' behalf that falsely alleged that her husband had delivered the RSA applications of various Genesis clients to a Federal Express office for dispatch to the Commission although in fact he had thrown the applications in a garbage dumpster. *Id.* at 7137 ¶50, 7138 ¶56. The other factual issue specified by the HDO is whether Mrs. Naleszkiewicz lied in affidavits filed with the Commission in January and March 1990 about the extent of her involvement in or knowledge of the defrauding of Genesis clients. *Id.* at 7134 ¶ ¶ 23, 26, and 28, 7135 ¶ ¶ 32, 36, and 37, 7137 ¶50.

3. Before the hearing began, ALJ Edward J. Kuhlmann found in light of documents obtained in discovery that Nancy Naleszkiewicz had lied in explaining, in a motion for acceptance of an untimely notice of appearance, why the notice had been filed late, and he therefore dismissed her application. FCC 91M-1790 (rel. 6-4-91). The Review Board affirmed the summary findings and the dismissal order, 6 FCC Rcd 4829 (1991), but the Commission held that the summary misrepresentation findings were unwarranted and vacated the dismissal order, leaving it to the ALJ to decide whether additional hearing issues should be specified concerning the veracity of Mrs. Naleszkiewicz's explanation for the late filing of the notice. 7 FCC Rcd 1797 (1992).

4. The ALJ subsequently did specify such an issue, FCC 92M-357 (rel. 3-23-92), whereupon the applicant asked him to recuse himself, contending that, since he had already held that she had lied in this regard, he was disqualified by bias from presiding over an evidentiary hearing concerning her veracity in that respect and from issuing an initial decision addressing that factual issue. The ALJ refused to withdraw, however, and the Review Board and the Commission denied appeals from his denial of the recusal motion. 7 FCC Rcd 3098 (1992); 7 FCC Rcd 7149 (1992). The applicant complains once more in her current application for review that the ALJ was disqualified to try the case, but in light of the disposition that we reach here on the basis of the evidence we see no need to address that objection again. In view of these circumstances special care is warranted, however, to ensure that justice is done in this case. Having carefully reviewed the record, we have concluded that the lower decisions resolved the hearing issues against the weight of the evidence.

I. The question of complicity in fraud and related misrepresentation issues

5. Dr. Wladimir Naleszkiewicz, the applicant's husband, founded Genesis Enterprises, Ltd. in 1986 for the purpose of engaging in the business of preparing and filing cellular radio applications on behalf of others in exchange for consultancy fees. Dr. Naleszkiewicz owns 75 percent of the company's stock and Nancy Naleszkiewicz owns the remaining 25 percent. Dr. Naleszkiewicz was the company's President and Treasurer from the company's inception until February 1990, and Nancy Naleszkiewicz was its Vice President and Secretary during that period of time.

6. In December 1989 Dr. Naleszkiewicz and Genesis were indicted for mail fraud in violation of Federal statute, and Dr. Naleszkiewicz was also indicted for making false statements to officials of the U.S. Postal Inspection Service. The indictment did not charge Mrs. Naleszkiewicz with any wrongdoing, however. On February 8, 1990, pursuant to a formal plea agreement with Federal prosecutors, Dr. Naleszkiewicz pled guilty to two counts of mail fraud. A declaration endorsed by Dr. and Mrs. Naleszkiewicz and incorporated by reference in the plea agreement stipulates

[1] The Common Carrier Bureau, the Committee for a Fair Lottery, and Pacific Nationwide Cellular filed oppositions to the application for review on June 10, 1993. Nancy Naleszkiewicz filed a consolidated reply on June 18. Under 47 C.F.R. §1.115(d), replies to oppositions to applications for review of final decisions of the Review Board may be filed only if requested by the Commission. As no such request was made here, the reply will be dismissed without consideration.

that the prosecutors could prove beyond a reasonable doubt that, after having timely filed some 11,800 applications on behalf of clients within the first twenty filing windows for RSA license lotteries, Genesis did not have enough money left in its accounts in January 1989 to pay the FCC filing fees for most of the applications that it was then supposed to file for clients in the last two RSA filing windows, that Dr. Naleszkiewicz therefore withheld 1,438 of those applications instead of filing them with the FCC, and that he then mailed letters to the would-be applicants falsely informing them that their applications had been filed and the fees paid.

7. Nancy Naleszkiewicz pledged by the terms of the plea agreement that upon obtaining a construction permit for the Kansas 3 RSA cellular station she would assign the permit to a trustee who would sell the permit (which, according to the agreement, would be worth between two million and five million dollars) and use the proceeds mainly to compensate victims of the fraud. The first $575,000 after deductions for the trustee's expenses and compensation would be distributed to victims of the fraud, between 85 and 90 percent of the remaining proceeds would also be given to the victims, and the remainder, if any, would be given to Mrs. Naleszkiewicz.

8. In return, the prosecutors who endorsed the plea agreement promised to withdraw the other charges against Genesis and Dr. Naleszkiewicz and to recommend that a lenient sentence be imposed on him for the crimes for which he was pleading guilty. They further pledged that no charges would be brought against Mrs. Naleszkiewicz for involvement in the criminal conduct described in the incorporated factual stipulation. The agreement declares that it does not constitute an admission by her of any knowledge of or complicity in her husband's crimes. Applicant Exh. NN-1(a) at 11.

9. Mrs. Naleszkiewicz has consistently denied that she conspired with her husband to perpetrate a fraud on Genesis' clients or that she had any prior knowledge that he intended to do so. The account of relevant circumstances that she gave in an affidavit submitted as her direct testimony, which is excerpted in the appendix to this opinion, is credible on its face and fully comports with the evidence as a whole.

10. *Corroborating testimony as to the limited and subordinate nature of Mrs. Naleszkiewicz's role at Genesis and her general ignorance of its financial situation:* There is ample corroborative evidence to confirm Mrs. Naleszkiewicz's testimony that prior to her husband's resignation in February 1990 she had left it to him to exercise general supervisory authority over Genesis while confining her own attention to clerical and menial chores, and that in consequence she had been unaware until long after the event that Genesis did not have enough cash on hand to pay filing fees for all of the applications that it was supposed to file for clients in the January 1989 filing windows. Dr. Naleszkiewicz confirmed that he alone "ran the company"; that his wife's duties consisted merely of paying bills, handling personnel problems, signing checks to cover filing fees, and helping on an as-needed basis to physically assemble and package applications for transportation to the FCC's filing office; that he had not told his wife that the company would be unable to pay filing fees for many of the client applications due to be filed in the last two RSA filing windows because she was distraught in the wake of her niece's death and he did not wish to add to her distress; and that for the same reason he had concealed from her the fact that he had thrown most of those applications away instead of delivering them to Federal Express for shipment to the FCC. Applicant Exh. VN, pp. 7-8 and 11-12.

11. Although it must be borne in mind when weighing his testimony that Dr. Naleszkiewicz was not a disinterested witness, it is also worth noting that he had an unusual and compelling incentive for testifying truthfully. He is obliged by the terms of his plea bargain to comply with any future demand from the U.S. Attorney's office to submit to a polygraph test, to be administered by someone chosen by the government, to determine whether he has breached any covenant of the plea agreement, and the agreement also provides that any dispute as to whether he has broken the agreement will be resolved by the U.S. District Court for the Eastern District of Virginia and that the results of such polygraph test will be admissible for purposes of any such adjudication. The agreement includes a covenant whereby Dr. Naleszkiewicz has promised not to commit any more crimes, and any deceitful misrepresentation by him in sworn testimony before this agency would be a criminal act under Federal law and would thus be in violation of that covenant. The agreement further provides that should it ever be determined that Dr. Naleszkiewicz broke one of its covenants or "knowingly withh[e]ld evidence from . . . or otherwise [failed] to be completely truthful with . . . an officer of the United States" the U.S. Attorney's office will be free to prosecute him for that offense and/or for any previous criminal offense aside from those that he has already pleaded guilty to. Hence, he had reason to fear when testifying in this proceeding that the veracity of his sworn statements would be tested by polygraph examination and that if the results indicated that he committed perjury he would be prosecuted for that crime and also on charges that the prosecution had agreed to drop when the plea bargain was struck. Applicant Exh. NN-1(a), pp. 14-15 and 17-19.

12. Nancy Wardinsky, a Genesis employee who assertedly had a close working relationship with Mrs. Naleszkiewicz, testified that Mrs. Naleszkiewicz "typically allowed Dr. Naleszkiewicz to make all the major business decisions" and was "not involved in the financial operations of the company" as far as Wardinsky could tell. Applicant Exh. NW, p. 5. Further, Wardinsky testified,

> I am aware of no facts or circumstances which lead me to suspect, much less know, that Nancy Naleszkiewicz participated in or knew of any improper activities concerning the applications prepared by Genesis for filing in January 1989. Nancy never did or said anything which would make me think that she had participated in any way in not properly filing the applications for the January 1989 windows or that she knew anything about Dr. Naleszkiewicz's activities in that respect until the plea agreement became known. Nor did she ever say or do anything which would make me think that she did not believe her husband when he told her and the rest that he had used Federal Express to file all the applications prepared by Genesis for the January 1989 filing windows.

Applicant Exh. NW at p. 4.

13. Vicky Dominique, who was employed at Genesis from September 1988 through January 1989 as Assistant Office Manager, reporting to Wardinsky and Mrs. Naleszkiewicz, also confirmed that Mrs. Naleszkiewicz had

handled internal personnel affairs, signed checks, and occasionally assisted in packaging applications and had not been involved in financial management, to the best of her knowledge, and that Dr. Naleszkiewicz had "handled all the . . . accounting and the accounts and the monies." Applicant Exh. VD p.2; Tr. at 347. Like Wardinsky, Dominque, who helped Mrs. Naleszkiewicz package the applications that were to have been filed in January 1989, also testified that she was not aware of any circumstance tending to indicate that Mrs. Naleszkiewicz had known that most of those applications were not sent to the FCC. Applicant Exh. VD p.5.

14. Edward Lee Curtis, Jr., a CPA who provided outside accounting services to Genesis from December 1986 until the time of the hearing, including monthly reconciliation of bank statements with deposit receipts and cancelled checks and the preparation of monthly financial statements reporting the reconciled balances in the firm's bank accounts, testified that he compiled the financial statements from information supplied by Dr. Naleszkiewicz and that he sent the statements to Dr. Naleszkiewicz. Mr. Curtis testified as follows concerning his contacts with Mrs. Naleszkiewicz:

> Although Mrs. Naleszkiewicz worked for the company, and did answer the telephone on occasion, I was not aware specifically what her job was at Genesis, and I found she would not know the answers to the financial questions which I periodically had concerning the information provided to me by Dr. Naleszkiewicz. I would end up speaking with Dr. Naleszkiewicz to get the answers, and my contacts with Mrs. Naleszkiewicz occurred in the same context as those I had with the secretary at Genesis; both relayed messages from me to Dr. Naleszkiewicz, and vice versa. All my written communications with the company prior to March 1990, to my knowledge, were solely addressed to Dr. Naleszkiewicz. When I was given instructions or asked corporate questions, they came from Dr. Naleszkiewicz.

Applicant Exh. EC, p.6.

15. *Absence of impeaching witnesses or documents:* According to undisputed testimony, Genesis employed a sizeable workforce, eventually numbering nearly thirty people, during the time when it was preparing and filing RSA applications, most of whom were no longer working for it at the time of the hearing. If Mrs. Naleszkiewicz played a more central role in the firm's management than she represented in her testimony, then presumably some of those who worked for it at the relevant time would have had personal knowledge of facts at odds with her assertions in this regard. The parties to this proceeding who oppose her application, however, did not present or develop testimony from any witness that materially contradicts her account of her functions at Genesis or indicates that she knew at any relevant time that her husband had deliberately refrained from filing clients' applications with the FCC. The absence of impeaching testimony is particularly impressive in view of the fact that the applicant and her husband waived their attorney-client privilege, permitting testimony to be taken from attorneys concerning the substance of private consultations with them concerning the events in question. It is also worth noting that although Federal investigators searched Genesis' office in the fall of 1989 without prior warning and seized all the documents they found there pertaining to RSA applications (7 FCC Rcd at 7619 ¶73 ; Tr. at 398 and 400), the adversary parties have not produced documentary evidence that materially belies the applicant's statements.[2] Considered in contrast with the wealth of corroborating evidence, the dearth of impeaching evidence speaks eloquently in her favor.

16. Ignoring the testimony that substantially corroborates Mrs. Naleszkiewicz's account of the facts -- there is no mention in the lower decisions of *any* of the corroborating testimony just described -- the ALJ and the Review Board purport to find numerous grounds for disbelieving her, but their interpretation of the evidence will not bear close scrutiny.

17. *The lower decisions' conjectural reasons for discrediting Mrs. Naleszkiewicz's account of her role at Genesis prior to February 1990:* The ALJ and the Review Board based their conclusion that Mrs. Naleszkiewicz was an accomplice in the fraud to which her husband pled guilty partly on inferences from circumstantial evidence that, in their view, indicated that she had played a more important role in the management of Genesis during the relevant period of time than she admitted in her testimony. In this regard, they stress or assert that: she was "an experienced cellular application operative" who "already understood the application process for cellular frequencies" before she began working at Genesis; she testified intelligently at the hearing and "was able to explain in detail how Genesis operated"; she was admittedly "an active partner of her husband in many key aspects of the enterprise;" she was Vice President and 25 percent owner of the company; "she ran the company herself during a critical 1987 period" while her husband was recovering from cardiac surgery; she became President of Genesis in 1990, when her husband resigned from the office after entering the guilty plea; and she exaggerated the extent to which her niece's fatal illness distracted her from business affairs. 7 FCC Rcd at 7624 ¶12 7, 7627 ¶14 8-49; 8 FCC Rcd at 2785 ¶25. Most of these findings are misleading, and to the extent that they fairly reflect the evidence they are immaterial.

18. The Board's description of Mrs. Naleszkiewicz as "an experienced cellular application operative" is misleading insofar as it suggests that she came to Genesis well-qualified by experience to take a leading part in managing the business -- which, if true, would undermine the plausibility of the testimony that she had left it to her husband to run the business and had occupied herself in merely ministerial functions until 1990. In fact, the record shows that she was far less qualified than her husband to manage the business. According to uncontradicted testimony, she received no formal education beyond high school, aside from attending a few college psychology classes. Tr. at 135-36. She was employed in 1983 and 1984, evidently on a part-time basis, by Satellite Systems Engineering Inc., a company that, like Genesis, was in the business of preparing cellular applications for others, where she supervised a group of employees who conducted a market survey, but her main prior job experience consisted of employment for ten years with

[2] It appears that the parties to this proceeding had access to the seized documents prior to the hearing. 5 FCC Rcd at 7134 ¶28.

a telephone company as a directory assistance operator and as a clerk, which continued until she began working at Genesis, in 1986. Tr. at 135-38, 141.

19. Her husband, on the other hand, has a master's degree in political science and economics and a Ph.D in economics; has published numerous articles in professional journals; was Associate Professor of Economics at Notre Dame University at South Bend from 1962 to 1966; managed a department of COMSAT from 1966 to 1969; was a full professor of economics at Cleveland State University from 1969-1970; accepted a position in the FCC's Common Carrier Bureau in 1970; was employed by the White House in 1975 to help establish an international division in the Office of Telecommunications Policy; was appointed by Congress in 1979 to a position in the Office of Technology Assessment, where he dealt with telecommunications issues; was employed by Satellite Systems Engineering, Inc. (SSE) from 1980 through 1985, where he was appointed Executive Vice President and supervised that company's venture into the business of preparing cellular applications (and where he evidently met his wife during her short stint at SSE in a lower-level job); and founded Genesis in 1986. Applicant Exh. VN, pp. 2-4. The marked difference between their educational credentials and career experience lends credence to the testimony that Nancy Naleszkiewicz -- who prior to 1990 had never managed a business of any kind, and who evidently became a co-owner and officer of Genesis in consequence of her marriage to Dr. Naleszkiewicz rather than through any independent initiative on her part -- had been content to leave management of the company essentially to her husband while occupying herself with merely ministerial chores.

20. The Board's finding that Mrs. Naleszkiewicz was "an active partner of her husband in many key aspects of the enterprise" is misleading insofar as it implies that the evidence establishes that she had had a real say in the overall management of Genesis at any time before he pled guilty to defrauding its clients. Rather, as we have already noted, the mutually-corroborative and uncontradicted testimony of several witnesses indicates that her functions at Genesis prior to then had been merely clerical and menial in nature and that she had left overall supervision of the company entirely to Dr. Naleszkiewicz. Her ready acknowledgment that she owned a portion of the company's stock and had been its Vice President does not materially contravene that testimony, and the fact that in her hearing testimony she displayed a degree of intelligence and a grasp of the manner in which Genesis operated is likewise insignificant. As a salaried employee of the company and as the spouse of its founder, chief executive, and majority stockholder, with a 25 percent share of it in her own name, Mrs. Naleszkiewicz would have learned a good deal about the general way in which it did business, whether or not she ever had a say in its management; hence, even if it could be found that she was as knowledgable in that regard at the time the fraud was perpetrated as she was when testifying the finding would be of little moment. *A fortiori*, the fact that she knew a good deal about the company's general business procedures when testifying in 1992, two years after having replaced her husband as president and after having become embroiled in this litigation, is no proof that she had collaborated in its management in 1988-89 or that she had known in the first instance that clients' applications were deliberately withheld from filing in January 1989. (According to her attorney, the applicant was largely ignorant of the company's manner of operation at the outset of this proceeding and had to rely on her husband to answer interrogatories concerning it. Tr. at 888-89.)

21. It is also an exaggeration to say that Mrs. Naleszkiewicz "ran the company herself during a critical 1987 period." The finding refers to a four-month interval when Mrs. Naleszkiewicz temporarily served as an emergency stand-in while her husband was recuperating from heart surgery. That interval occurred long before the events immediately pertaining to the perpetration of the fraud and at a time when Genesis was not engaged in preparing or filing applications. Tr. at 141-43. According to uncontradicted testimony, moreover, Mrs. Naleszkiewicz did not really take control of the company during that interval, but instead relied on her husband to make decisions. Applicant Exh. NN, p.3; Applicant Exh. VN, p.8; Tr. at 150, 153-54.

22. The fact that Mrs. Naleszkiewicz became the nominal president of Genesis when her husband resigned in 1990 does not lead us to infer, contrary to the testimony, that she had regularly collaborated in managerial decisions prior to then. If the evidence showed that she took complete control of the company in 1990 and has managed it ever since without relying on her husband for advice, there might be some doubt as to the veracity of the testimony that she had previously left the running of the company entirely up to him -- but that is not what the evidence shows. Rather, the record indicates that since resigning from formal corporate office her husband has continued to pull the company's strings from the background; Mrs. Naleszkiewicz solicits his advice regarding "most major business decisions" and does what he tells her to do as long as it's not illegal or immoral, and he still supervises the firm's finances. Applicant Exh. NN, p.14; Applicant Exh. EC, p.7; Tr. at 431-32, 596-98, 682, and 985-89.

23. There is no good reason to discredit Mrs. Naleszkiewicz's testimony that she was "even less involved [than usual] in Genesis' operations" from the summer of 1988 until November of that year because she was preoccupied with her niece's medical problems and that she was too distressed for several months after the niece's death in November 1988 to pay much attention to the company's daily affairs. Taking no note of the testimonial details that reinforce the plausbility of those assertions -- particularly that Mrs. Naleszkiewicz had raised the niece from infancy as her own child and that the niece gave birth only two weeks before dying from cancer after having chosen to sacrifice her own prospect of survival in order to carry the unborn baby to term -- the ALJ impugned the veracity of the applicant's testimony in this regard because, he said, her assertion that during the last two and a half months of her niece's life she had driven to Baltimore each night to visit her in the hospital was not supported by "objective" evidence and was belied by evidence that she had gone to France in October 1988. 7 FCC Rcd at 7617 ¶39, 7627 ¶14 9. Mrs. Naleszkiewicz confirmed that she and her husband went to France in early October 1988 to attend a telecommunications conference but testified that she had rushed back to be with her niece again after having spent only three days there. Tr. at 231-32, 599-600. The evidence that she was briefly out of the country for a three-day business trip at one point during her niece's prolonged ordeal does not, in our view, materially detract from the credibility of her testimony about the extent to which her reaction to that ordeal distracted her during the period of time when the financial crisis developed that eventually

drove her husband to resort to fraud. Although it may not be supported by "objective" evidence, the applicant's testimony in this regard is credible on its face, partly corroborated by other witnesses, and uncontradicted. Tr. at 359 and 1146; Applicant Exh. NW, p.5.

24. *Whether Mrs. Naleszkiewicz knew beforehand that Genesis would not have enough money on hand to pay FCC filing fees for all of its clients' applications that were due to be filed in the last two RSA filing windows:* The lower decisions conclude for several reasons that Mrs. Naleszkiewicz must have known before the last two RSA filing windows opened in January 1989 that Genesis would not have enough money in the bank to pay the filing fees for all, or even most, of the client applications that it had contractually promised to file with the FCC in those windows. For one thing, the ALJ and the Board both infer that she had been routinely aware of the approximate amounts of the company's cash reserves. They base that inference on findings that she had received copies of each check to Genesis from clients and had also received monthly statements from its outside accountant that listed the balances in its bank accounts, that she had known how many bank accounts Genesis had and what their purposes were, and that she had correctly said in a pre-hearing deposition that the accounts that had been used to hold funds for fee payments had been closed in February or March of 1989, thus "exhibit[ing] a knowledge of the fee accounts". 7 FCC Rcd at 7615 ¶ ¶ 20 and 22, 7624 ¶ ¶ 128-29; 8 FCC Rcd at 2785 ¶25. Although the record does show that extra copies of clients' checks and the accountant's monthly statements were routinely distributed to Mrs. Naleszkiewicz in 1988, it does not necessarily follow that she paid attention to them.

25. In fact, she had no reason to look at the checks from clients, as she was not responsible for keeping track of their payments. That responsibility belonged instead to Nancy Wardinski, who was in charge of accounts receivable and collections, to Dr. Naleszkiewicz, who deposited clients' checks and sent the deposit receipts to the accountant, and to Edward Curtis, the accountant, who balanced the company's bank accounts and prepared the monthly financial statements. Applicant Exh. NW, pp. 1-2; Applicant Exh. VN, pp. 7 and 9-10; Applicant Exh. EC, pp. 2-3; Tr. at 192. Nancy Wardinski, who compiled client files containing copies of checks and other papers, routinely sent extra copies of the checks and other client papers to Mrs. Naleszkiewicz,[3] which "just piled up and piled up" in the latter's office, according to Wardinski, until Mrs. Naleszkiewicz threw the accumulation of supplementary copies away to free up file space and told Wardinski to stop sending her such material because she had no use for it. Tr. at 185-88, 664, 684. Extra copies of the accountant's monthly financial reports were also distributed to Mrs. Naleszkiewicz in 1988 and 1989, but her duties at that time did not require her to review them, and there is no evidence that she ever reviewed any such report in either of those years. When shown copies of the accountant's reports for December 1988 and January 1989 at the hearing and asked whether she "ever saw them before they were used in this proceeding," she testified that she did not believe that she had. Tr. at 265. In short, uncontradicted testimony from several witnesses clearly establishes that Mrs. Naleszkiewicz took no responsibility whatever for overseeing the company's finances in 1988 or 1989, and there is no evidence that she paid any attention to the extra copies of clients' checks and financial reports that were routed to her office in those years. That she knew when testifying how many bank accounts Genesis had kept at relevant times and what their purposes were and knew at a pre-hearing deposition session approximately when the accounts containing funds for paying filing fees had been closed is of little moment.

26. The lower decisions stress that Mrs. Naleszkiewicz wrote all the checks that Genesis sent to the FCC to pay filing fees (7 FCC Rcd at 7624 ¶12 9; 8 FCC Rcd at 2785 ¶25), but it cannot reasonably be inferred merely from the fact that she performed this ministerial task that she knew that there was not enough money in Genesis' disbursement account to cover all the fee checks for the applications that were to have been filed in the January 1989 filing windows. The evidence indicates, rather, that she left it up to her husband to see to it that there were funds enough in the disbursement account to cover filing fee payments. She testified that

> I performed this task [*i.e.*, writing the fee checks] only as specifically asked to do so by my husband, who was the only person at Genesis who reviewed, and was informed of, the company's financial status and bank balances. I never inquired, before signing those checks, often hundreds at a time, whether there were sufficient funds in the account to pay them; based on Wladimir's handling of the bank accounts I assumed there were.

Applicant Exh. NN, p.3. The ALJ and the Board refuse to believe, however, that she wrote the fee checks without asking about the balance in the disbursement account, inasmuch as she revealed under cross examination that she had customarily asked her husband about the amount of money in the company's general operating account before writing payroll checks or checks to pay bills for ordinary expenses. 7 FCC Rcd at 7624 ¶12 9; 8 FCC Rcd at 2785 ¶25. But there is no irreconcilable discrepancy here. As her husband had reason to know exactly how much money was needed to pay the filing fees for each batch of applications and as she wrote the fee checks for a particular batch only when he specifically directed her to do so, Applicant Exh. NN, p.3, Mrs. Naleszkiewicz could reasonably assume, as she testified, that whenever he told her to write filing-fee checks he had previously made sure that there was enough in the account to cover them. On the other hand, her husband left it up to her to pay bills and employees' salaries and could not be sure of the total amount charged in outstanding bills at any point in time unless she told him; hence, she had no equivalent reason to assume without asking that there was enough money in the appropriate account to cover the total amount of the bills and payroll expenses that she contemplated paying in each instance. Tr. at 152, 508, and 614-15.

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[3] The finding that internal memoranda show that Mrs. Naleszkiewicz received the original of each check as well as a copy, 7 FCC Rcd at 7615 ¶20, is misleading. The evidence indicates that her husband received the originals at all times prior to his resignation in 1990 except during the interval in 1987 when he was bedridden after heart surgery. CFL Exh. 4; Tr. at 181; Applicant Exh. VN at p.7.

27. The lower decisions also find that Mrs. Naleszkiewicz knew in December 1988 that the funds from a $150,000 loan that she and her husband drew early in that month were needed to make up for a shortfall in bank deposits to cover filing fee payments for client applications that were due to be filed later in the same month and contend that her supposed knowledge of this fact put her on notice that Genesis would probably be unable to pay the filing fees for the applications that it had contractually promised to file in January 1989. 7 FCC Rcd at 7617 ¶ ¶ 46, 7625 ¶13 2; 8 FCC Rcd at 2780-81 ¶11, 2785 ¶25.

28. It is not clear from the evidence, however, that Mrs. Naleszkiewicz knew that a considerable part of the $150,000 loan was needed to cover filing fees for the December batch of applications. She testified that her husband had not informed her of this but had told her, rather, that the loan proceeds would be needed to meet payroll expenses accruing after the last RSA filing window, when the company would be short of income pending the next round of cellular lotteries, and to reimburse the company for filing fees for applications that she had filed on her own behalf in previous RSA filing windows. Applicant Exh. NN, p.5; Tr. at 152, 213, 218-20, 227, and 253-54. The lower decisions conclude for three reasons that she lied in so testifying: first, because her husband supposedly admitted in a deposition and confirmed in testimony that he had told her that they needed the loan to cover filing fees; second, because an exhibit in evidence indicates that both Naleszkiewiczes endorsed the lender's check with an inscription directing that it be paid into the company's escrow disbursement account, which, as Mrs. Naleszkiewicz knew, was used as a repository of funds from which to pay filing fees; and third, because she admittedly remembered that Nancy Wardinski had telephoned Dr. Naleszkiewicz late in 1988 to relay a message from the bank about a shortage of funds in the fee disbursement account to cover checks presented for payment. 7 FCC Rcd at 7617 ¶ ¶ 43, 44 and 46, 7625 ¶ ¶ 132-33; 8 FCC Rcd at 2780-81 ¶11, 2785 ¶25.

29. Mrs. Naleszkiewicz's testimony about the phone call to her husband concerning a shortage of funds does not establish that she knew that Genesis needed the loan proceeds to cover the fee checks for the applications that it filed in December 1988. She merely testified that it was her understanding that the circumstances that had precipitated the phone call were that "checks were going to bounce or something" because her husband had inadvertently neglected to transfer funds from Genesis' money market account to the fee disbursement account pursuant to routine procedure.[4] Tr. at 234. There is no indication in this that she knew that there was a shortage in *both* accounts and that her husband had therefore had to deposit most of the loan proceeds in the disbursement account in order to make good on the December fee checks.

30. Furthermore, contrary to the Board's pertinent finding, 8 FCC Rcd at 2780 ¶11, Dr. Naleszkiewicz did not testify at the hearing that he had told his wife that the loan was needed to pay filing fees. He testified that he had told her that they needed to borrow money for the company to keep it in business but denied having told her that the loan was needed to pay filing fees due to a shortage in the escrow fund. Tr. at 929, 1146, and 1149. He said that she had not pressed him for further explanation and that he had offered none, attributing her lack of curiosity to the fact that she had just "spent two months in Johns Hopkins watching [her niece] die" and generally trusted his business decisions anyway. Tr. at 1146-47. According to an extract from a transcript that was read into the record, Dr. Naleszkiewicz said at a deposition session, when asked whether he had discussed the loan with his wife, "I told her we needed money and I'm trying to collect from various brokers that the people owed us money, but in the meantime, we have to file, and that is the most important thing, so since we have done it on the more limited basis and the money was eventually paid, she said fine." (Similarly, as the lower decisions note, the deposition transcript shows that he acknowledged having told his wife that "we didn't have enough cash.") This testimony is not clearly inconsistent with Mrs. Naleszkiewicz's account of the discussion, as the remark thus described does not plainly indicate whether her husband believed that Genesis would not have enough cash without the loan to cover filing fees or whether he merely feared that its cash reserves were too low to cover filing fees *and* meet operational expenses accruing after the last RSA filing window. When the questioner at the deposition session then asked Dr. Naleszkiewicz whether he had told his wife that he needed the loan for filing fees, he replied that he could not recall exactly what he had told her. In the ensuing colloquy, he admitted that the loan had been needed to cover filing fee checks but did not clearly say that he had told his wife as much. When asked, again, what he had told her about the need for the loan to cover fee checks he replied, consistently with his hearing testimony, "I didn't provide any information. I just said we need the money and that would probably take care of it and that is about the size of it." Tr. at 1169-71.

31. The evidence that the Naleszkiewiczes endorsed the loan check for deposit into the fee disbursement account does not clearly prove that Mrs. Naleszkiewicz knew that Genesis needed the proceeds largely to pay filing fees for client applications to be filed in December 1988. She knew that her husband planned to spend a substantial portion of the loan proceeds, in the amount of $25,000, to reimburse Genesis for filing fees for RSA applications that she had filed on her own behalf in previous filing windows (Tr. at 207; 7 FCC Rcd at 7617 ¶47), and the disbursement account was the appropriate repository for the funds earmarked for that purpose. Therefore, if she noticed that the superscription above the endorsements indicated that the check would be deposited in the disbursement account -- as to which she was not questioned at the hearing[5] -- she might well have supposed that her husband intended to deposit it into that account just so that the $25,000 due from her for filing fees would be credited to it and that he

[4] Dr. Naleszkiewicz routinely deposited checks from clients to cover filing fees in an "escrow" account earning money-market interest rates and transferred funds from that account to the fee disbursement account just before each RSA filing window. The checks that Genesis sent to the FCC to pay the filing fees for its clients' applications were always drawn on the disbursement account. 7 FCC Rcd at 7615 ¶19.

[5] When shown a copy of the cancelled loan check she acknowledged that the back of it was inscribed with her signature and with an instruction in her husband's handwriting that the funds were to be deposited in the disbursement account, but the examiner did not ask her whether she had noticed the instruction and appreciated its significance at the time when she endorsed the check. Tr. at 228-29.

would subsequently transfer funds in the amount of the remainder of the loan proceeds from that account to the firm's ordinary checking account.

32. In any event, whether or not the evidence shows that Mrs. Naleszkiewicz knew that the loan was needed to pay filing fees for some of the December batch of applications, we do not agree with the Board that she must have deduced from that circumstance, if she was aware of it, that Genesis would not have enough cash on hand to pay the filing fees for the applications to be filed in January. In order to deduce that, she would have had to have known not only that without the infusion of loan proceeds the disbursement fund would not entirely cover the filing fees for the December batch but also that Genesis would not receive enough cash in the interim for the fees for the next two batches from clients who still owed it engineering fees or had not yet paid it to defray the cost of filing fees.[6] The lower decisions cite no evidence that at thetime of either of the January filing windows Mrs. Naleszkiewicz had any definite information as to the total amount of cash payments Genesis had received from clients since the December filing, and we see no basis for finding so.

33. *The preparation of the January applications for shipment:* The initial decision dwells at length on the procedures followed on January 5 and 12, 1989, when Genesis employees compiled and bundled the two batches of applications due to be filed for Genesis clients in the last two RSA filing windows and when Dr. Naleszkiewicz threw most of them into a trash dumpster after telling his wife and employees that he would take them to a Federal Express office. 7 FCC Rcd at 7617-18 ¶ ¶ 50-64. Both lower decisions indicate that some of the testimony about events on those days affords further support for inferring that Mrs. Naleszkiewicz knew by then that her husband did not really intend to file all the applications. The decisions stress in this regard that unusual procedures were followed in those two instances: Dr. Naleszkiewicz announced that he would take the applications to a Federal Express office for shipment to the FCC's filing office in Pittsburgh, whereas in all previous instances Genesis employees had transported RSA applications to Pittsburgh in a pick-up truck, and Mrs. Naleszkiewicz helped employees remove the transmittal sheets that were ordinarily sent with each application to be date-stamped at the FCC and kept as proof of filing.[7] 7 FCC Rcd at 7626 ¶138; 8 FCC Rcd at 2781 ¶12. Consistent and uncontradicted testimony of the Naleszkiewiczes and other witnesses establishes, however, that Dr. Naleszkiewicz gave a plausible explanation to his wife and employees for shipping the applications by Federal Express instead of delivering them by the usual means and that no-one suspected at the time that he had an ulterior motive for that decision. See Applicant VN, pp. 12-14; Applicant Exh. NN, pp. 6-7; Applicant Exh. NW, p.3; Applicant VD, p.3; Tr. at 325, 361-62, 370, 519, 651, 673, and 945.[8]

34. Credible testimony that the lower decisions ignore discloses, moreover, that there was an innocuous reason for removing the transmittal sheets and that those who were aware of it saw nothing untoward about that procedure, either. Had the applications been trucked to Pittsburgh by a Genesis employee the employee would have brought the date-stamped transmittal sheets back with him, but as a result of the last-minute decision to deliver via Federal Express it would have been necessary to include stamped, self-addressed envelopes to insure that the sheets would be returned, and there was not enough time left to prepare self-addressed envelopes for all 719 applications before taking them to the Federal Express office in time for them to be delivered to the FCC's receiving office by the filing deadline. Applicant Exh. VN, p.13; Applicant Exh. NN, p.6; Applicant Exh. VD, p.3; Applicant Exh. NW, p.2; Tr. at 282, 654, and 944-45. (The transmittal sheets were not indispensible, as shipping receipts and cancelled filing-fee checks would serve as proof of filing in any event.)

35. As a result of prior litigation, Genesis was bound by a settlement agreement to file RSA applications at its own expense for a company named Cell-Cal, and because of that circumstance and because he knew that there was enough money in the escrow fund to pay the filing fees for the applications that it was obliged to file for Cell-Cal in each of the last two RSA filing windows, Dr. Naleszkiewicz actually gave the Cell-Cal applications to Federal Express for delivery to the FCC in both instances, instead of throwing them away with the other applications that he discarded in the dumpster. 7 FCC Rcd at 7614 ¶14, 7618 ¶62, 7625 ¶135. After noting that Mrs. Naleszkiewicz had been aware of the settlement with Cell-Cal, the initial decision asserts that she revealed in a deposition that she knew at the time that the Cell-Cal applications were packed separately on January 5 and January 12, 1989 before being loaded into her husband's pick-up truck along with the other applications that were ostensibly to be taken to the Federal Express office, *id.* at 7625 ¶ ¶ 135-36, and the ALJ suggests that her supposed knowledge that the Cell-Cal applications were separately packed is materially incriminating. *Id.* at 7626 ¶138.

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[6] Dr. Naleszkiewicz testified that some clients were routinely withholding payments for engineering fees until just prior to the filing windows for their applications, that many customers were dilatory about paying Genesis to defray filing fees, that by August 1988 the amount due from clients for filing fees alone was $1,370,000, that a substantial amount was still due from clients and brokers in early January 1989, and that he had hoped "until the last minute" that enough would be received from those sources to enable Genesis to pay the filing fees for all the applications to be filed in the last two filing windows. Applicant Exh. VN, pp. 5, 6, and 11; Tr. 944, 1110-13.

[7] It appears from the evidence that normal procedures were otherwise followed on these occasions. For instance, it seems that Mrs. Naleszkiewicz wrote out filing-fee checks for all of the January 1989 applications, including those that her husband later discarded. Tr. 278-79 and 322-33.

[8] According to the testimony cited above, Genesis had an informal contingency plan to file by Federal Express in case of poor winter road conditions, and as the weather on January 5, 1989 was reported to be bad between Washington and Pittsburgh, Dr. Naleszkiewicz mentioned this to employees as the reason for resorting to shipment via Federal Express as the means of delivering the applications to be filed in the January 4-6 filing window. He testified that he told his wife on the morning of January 12, 1989, the second day of the last RSA filing window, that he did not want to rely on Genesis employees to deliver the last batch of applications to Pittsburgh because he had told them that they would be laid off the next day and feared that they might tamper with the applications or misplace them out of spite. He told the staff that he had decided to rely on Federal Express shipment again because adverse road conditions had been predicted for Pennsylvania on that night and because there had been no problem with delivery by that means in the previous week.

36. In point of fact, the evidence does not support the finding that Mrs. Naleszkiewicz knew at the time that the Cell-Cal applications were packed separately. Rather, it merely indicates that she knew that Cell-Cal's applications were usually prepared with special care and bundled together with rubber bands; that she assumed, in hindsight, at the hearing, that they had been separately packed on January 5 and 12, 1989, instead of being put into the boxes in which the other applications were packed, as she knew by then (*i.e.*, at the time of the hearing) that her husband had disposed of them differently than the other applications; but that she could not confirm from her own recollection that they had been kept apart. Tr. at 306 and 379-82. (Contrary to the finding in ¶13 6 of the initial decision, there is no conflict between her hearing testimony and her deposition in this regard.)[9] In any event, had she noticed that the Cell-Cal applications were packed separately she would have had no reason to infer that anything was amiss, as it was common knowledge among Genesis employees that Cell-Cal's applications had been given special handling as a matter of course in previous filing windows. Tr. at 380, 813-16, 1091-1109, and 1113-14.

37. *Whether Mrs. Naleszkiewicz learned the truth at some point between January 12, 1989 and January 29, 1990:* As elucidated by the text of the Hearing Designation Order, the formally-specified misrepresentation issue in this proceeding includes within its ambit a question as to whether Mrs. Naleszkiewicz knew when her husband filed "petitions for inclusion" with the Commission on November 9 and 20, 1989 that the petitions misrepresented the facts in alleging that he had given the Federal Express 719 RSA applications on January 5, 1989 and 810 more applications on January 12, 1989 for delivery to the FCC's receiving office. (He had actually turned over only 22 applications to the Federal Express on January 5 and only 69 on January 12.) 5 FCC Rcd 7131, 7137 ¶50 (CCB 1990). The misrepresentation issue also entails a question as to whether Mrs. Naleszkiewicz lied in denying in a pleading filed on January 29, 1990 that she had any knowledge of a scheme to defraud Genesis clients. *Id.* at 7134 ¶23, 7137 ¶50, 7138 ¶56 (CCB 1990). As grounds for adverse resolution of these misrepresentation issues (in addition to their findings concerning the applicant's knowledge on or before January 12, 1989), the lower decisions suggest that several events occurred after the RSA filing windows in January 1989 and before the filing of the petitions for inclusion and/or before January 29, 1990 that must have alerted Mrs. Naleszkiewicz to the fact (if she was not already aware of it) that her husband had actually taken only a few of the applications prepared on January 5 and 12, 1989 to the Federal Express office.

38. The lower decisions stress, for instance, that Mrs. Naleszkiewicz disclosed that in March of 1989, in response to a request by Genesis' attorney, who had informed her that Cell-Cal wanted proof that its applications had been duly filed in the last several RSA filing windows, she had sent the attorney copies of the cancelled filing-fee checks for Cell-Cal's applications. 7 FCC Rcd at 7626 ¶139; 8 FCC Rcd at 2785 ¶25. The Review Board infers from this that she must have noticed when retrieving the cancelled checks for those applications in order to copy them that there were no similar checks on file for the 1438 applications that her husband had thrown away. 8 FCC Rcd at 2785 ¶25. The inference is unwarranted. The record does not disclose whether Mrs. Naleszkiewicz, herself, retrieved the originals or file copies of the checks and copied them or delegated the chore to a subordinate. Furthermore, according to the testimony, Genesis employees maintained client-specific files containing copies of checks and other documents pertaining to each client's applications (Tr. at 185-88, 588-89, and 636-38), and it is not evident whether the Cell-Cal checks were retrieved from the Cell-Cal client file -- which would not have alerted anyone to the fact that checks were missing from other clients' files -- or instead from a file or receptacle in which cancelled checks from different clients were commingled.[10]

39. On October 6, 1989 the FCC released a Lottery Notice listing the RSA applications that had been duly filed in the January 4-6 filing window. Of course, the notice did not list any of the applications that Genesis was supposed to have filed then except the 22 Cell-Cal applications. The FCC released a Lottery Notice for the January 12 filing window on October 20, 1989. At about the time the first of those notices was released, Al Waddill, a broker and former Genesis employee, told the Naleszkiewiczes that his clients' applications (which were among those that Dr. Naleszkiewicz had thrown into the dumpster on January 5) were not listed in it. Waddill asked Mrs. Naleszkiewicz to look for cancelled filing-fee checks for his clients' applications, and she searched for the checks but could not find them. 7 FCC Rcd at 7619 ¶ ¶ 66-67 and ¶71. The lower decisions find that Mrs. Naleszkiewicz deceitfully represented in her testimony that she "really didn't give [a] thought" to these ominous portents and that it was only later, when Postal Inspectors served her husband with a criminal complaint, that it was first intimated to her that some of the applications that Genesis was supposed to have filed in January 1989 had not really been filed. 7 FCC Rcd at 7626 ¶ ¶ 140-41; 8 FCC Rcd at 2781 ¶14, 2782 ¶15, 2785 ¶26.

40. This depiction of her testimony is inaccurate. She plainly declared in her direct testimony that she *did* "bec[o]me aware that there was a problem with the filing of Genesis' applications" when Al Waddill told her husband about the omission of his clients' names from the Lottery Notice of October 6 (Applicant NN, p.8), and there is no inconsistency between this and her hearing testimony that the first time she heard someone accuse her husband of failing to file applications was probably on October 23, 1989, when the Postal Inspectors came. Tr. at 389. She did

[9] The ALJ asserted in ¶13 6 that Mrs. Naleszkiewicz said at her deposition that the Cell-Cal applications were packed separately but testified at the hearing that she did not remember whether they were packed separately. In fact, the evidence indicates that she consistently said, both at the deposition and at the hearing, that she surmised that the Cell-Cal applications had been packed separately on January 5 and 12, 1989 but did not know that for a fact from her recollection of events. Tr. at 306 and 379-82.

[10] In any event, the mere fact that cancelled fee checks for most of the January applications were not on hand in March 1989, two months after their issuance, might not have been an obvious discrepancy to someone lacking information as to the amounts of time consumed in the process before cancelled fee checks had been returned after previous filing windows -- and there is no evidence that Mrs. Naleszkiewicz was privy to such information.

not say that she "really didn't give [a] thought" to the fact that the notices omitted any mention of most of the applications that Genesis was supposed to have filed in January 1989; rather, the gist of the testimony where that quoted remark appears is that the fact that the Cell-Cal applications were listed had seemed less noteworthy to her than the fact that many other client applications were not listed.[11]

41. Aside from misinterpreting her testimony in this regard, the lower decisions neglect to note and give due weight to uncontradicted testimony by Mrs. Naleszkiewicz that her husband lulled her by feigning innocence and offering a colorable conjectural explanation for the omission of clients' names from the lottery notices consistent with his pretense: to wit, he said that the missing applications must have been lost by the Federal Express or misplaced at the FCC's filing office. Applicant Exh. NN, p.8. Mrs. Naleszkiewicz was not the only one who found his explanation plausible. Nancy Wardinski also believed it until he pled guilty to mail fraud. Applicant Exh. NW, p.4; Tr. 673-75. He gave the same explanation in confidential conversations with attorneys, moreover, and there is no evidence that they or any Genesis employee challenged it in Mrs. Naleszkiewicz's presence. After explaining to his wife that either the Federal Express or the FCC's receiving agent must have lost the missing applications, Dr. Naleszkiewicz told her not to worry about the problem and said that he hoped to persuade the FCC to conditionally accept copies of the applications for purposes of the lotteries. Tr. at 541; Applicant Exh. NN, p.8.

42. The lower decisions conclude that Mrs. Naleszkiewicz could not have trusted in her husband's innocence after October 23, 1989, however, when Postal Inspectors served him with a criminal complaint charging him and Genesis with using the mail to defraud clients by falsely telling them that Genesis had filed their applications in the last two RSA filing windows. 7 FCC Rcd at 7626 ¶141; 8 FCC Rcd at 2785 ¶ ¶ 26-27. The Board stresses in this regard that Mrs. Naleszkiewicz admitted that she had read the complaint and the accompanying affidavit after the inspectors left yet testified that she had not asked her husband whether any of the allegations were true. 8 FCC Rcd at 2782 ¶15, 2785 ¶26. The weight of the evidence indicates, however, that Mrs. Naleszkiewicz did continue to believe in her husband's innocence after having read the complaint and affidavit.

43. The inspector's affidavit disclosed that the postal authorities had opened an investigation of the affair in response to prompting by Al Waddill and alleged that Dr. Naleszkiewicz had mailed letters assuring clients that Genesis had filed their RSA applications in the January 1989 filing windows; that only a few of those applications had been listed in the FCC's pertinent lottery notices; and that Dr. Naleszkiewicz had told Mr. Waddill that he had dispatched the applications by Federal Express but that Federal Express records showed that Genesis had shipped only two one-pound packages on January 5, 1989 and only one three-pound package on January 12, 1989, whereas Waddill estimated that the Genesis applications for each filing window would have weighed about 175 pounds. The revelation about recorded shipping weights did not force Dr. Naleszkiewicz to abandon his pretense of innocence, however; he gave a colorable explanation in reply to reconcile the low recorded shipping weights with his previous representations to his wife and others that he had handed over all of the applications to the Federal Express. See CCB Exh. 6, pp. 30-31, and CCB Exh. 8, pp. 10-11 and 28-29.[12]

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[11] The pertinent testimony is as follows:

> Q. What about the Cell-Cal applications? Were you concerned about whether or not they had been filed?
>
> A. No more so than anybody else.
>
> Q. Well, really you knew you had a settlement that required Genesis to file those applications, didn't you?
>
> A. Yes.
>
> Q. So this was not a concern of yours that, that you had agreed to a court settlement which required you to file applications?
>
> A. No, sir. I was, I was just as concerned about everybody else. As I said, they were friends and clients and people that we dealt with for a number of years, so I wouldn't want it to happen to anybody.
>
> . . . .
>
> Q. At that time, did you discover that the Cell-Cal applications had in fact been filed?
>
> A. Yes. I would have had to have because they would have been on the list.
>
> Q. But that was no greater significance to you than any other applications?
>
> A. Not at that time. I really didn't give it thought. I was concerned about the ones that weren't filed.

Tr. at 542-43.

[12] In affidavits filed with the FCC in November and December of 1989, Dr. Naleszkiewicz acknowledged that Federal Express records indicated that four one-pound packages were accepted from Genesis on January 5, 1989 for shipment to the FCC's receiving office and that two two-pound packages were accepted from Genesis for shipment to the same address on January 13, 1989, whereas Dr. Naleszkiewicz estimated that the total weight of the applications that he had handed over for delivery on each of those dates was about 40 pounds. By way of explanation for the discrepancy, he averred that he had learned from Federal Express employees that when receiving packages at a late hour or at an unusually busy time from a customer on a regular billing system, such as Genesis Enterprises, they would forgo weighing the packages and instead assign minimum weights based on the weight of past shipments by that customer and bill for those assumed weights. He further alleged that most of the packages that Genesis had shipped via Federal Express for overnight delivery during the three year period prior to January 1989 had weighed one pound. He substantiated the explanation with an affidavit from an employee of the law firm that Genesis had retained as counsel, who averred that someone named Darlene Brooks who had answered his telephone call to Federal Express's customer-service number on December 4, 1989 had informed him that "if a customer such as The Genesis Enterprises, Ltd. is on a regular billing system and they are busy and the hour is late, they will put on the customary charge which they would charge for other . . . packages sent out by the customer, rather than weighing them." Dr. Naleszkiewicz also submitted copies of four Federal Express airbills which indicated that the packages that Genesis gave to the Federal Express on January 5, 1989 for delivery to the FCC had not been weighed at the point of receipt. CCB Exh. 1, pp. 28-31; CCB Exh. 2, pp. 3-4; CCB Exh. 5, pp. 38-41 and 48-49; CCB Exh. 6, pp. 27-28, 30-31, and 37-38; CCB Exh. 8, p. 23.

His explanation in this respect was not so transparent that it must be presumed, contrary to the pertinent testimony, that his wife immediately saw through it. Dr. and Mrs. Naleszkiewicz credibly testified that she had been shocked and outraged that he was being officially accused of a crime, particularly because she had previously regarded the informant, Al Waddill, and his wife as "very good friends," and that she had suspected that Waddill, who had formerly been a Genesis employee and was then a business competitor, had instigated the investigation with the ulterior motive of putting Genesis out of business. Tr. at 396, 401-02, 409, 426, 429, and 1052. Her husband cast discredit on the affidavit, in her eyes, and aroused her suspicion about Waddill's motives, according to their testimony, by calling her attention to a factual error in the affidavit, and she remarked to him that several of its other allegations were also erroneous. Tr. at 1082. When a cross examiner challenged her to substantiate her testimony in this regard, she complied by explaining how several of the affidavit's allegations were inaccurate. Tr. at 406-07, 410-11, and 429.[13]

44. There is corroborative evidence, moreover, that supports the Naleszkiewiczes' testimony that Mrs. Naleszkiewicz continued to believe in her husband's innocence after seeing the complaint and affidavit on October 23, 1989. As found by the ALJ, the Naleszkiewiczes met with William Fishman, an attorney who later represented the applicant during the hearing in this case, after their encounter with the postal inspectors. 7 FCC Rcd at 7620 ¶78; Tr. at 98-100. Fishman was able to testify about the substance of the discussion at that confidential meeting because the Naleszkiewiczes waived their attorney-client privilege. He testified that he had questioned Mrs. Naleszkiewicz closely about her involvement in the affair of the missing applications because of its bearing on a conflict-of-interest issue, that she had told him that she not been involved and had no knowledge of any failure to file applications, that she had not taken issue in any way with her husband (who told Fishman that he had given all of the missing applications to the Federal Express for delivery to the FCC), and that she seemed convinced that "this whole thing had been precipitated by Mr. Waddill . . . to interfere with their business activities." Tr. at 87, 94, and 100-101.

45. The initial decison finds that Mrs. Naleszkiewicz's participation in the meeting with Fishman that she attended with her husband should have disabused her of the notion that her husband was innocent, but the ALJ's interpretation of the testimony in this regard is unwarranted. According to the ALJ, Fishman and the Naleszkiewiczes examined bank records and checks from which "it was evident that Genesis had not filed most of its clients' applications in January 1989." 7 FCC Rcd at 7626 ¶14 1. Mr. Fishman testified that he had met with Dr. Naleszkiewicz *two or three* times in the fall of 1989 and that Mrs. Naleszkiewicz had attended at least *one* of the meetings; that he had been skeptical of Dr. Naleszkiewicz's assertion that he had given all of the missing applications to the Federal Express *but had not said so in the meetings;* and that Mrs. Naleszkiewicz had said very little and had expressed no disagreement with her husband. Tr. at 83, 85, 88-89, 94, and 97-98. He testified that he had asked Dr. Naleszkiewicz for Federal Express records and financial records and that "we" -- *i.e.*, Mr. Fishman and an associate or associates -- had looked at bank statements and checks. Tr. at 97. It is not clear from his testimony, however, that Mr. Fishman looked at the bank statements and checks during any of the meetings in his office with Dr. Naleszkiewicz, let alone at the meeting (or meetings) that Mrs Naleszkiewicz attended. After testifying that he thought that Dr. Naleszkiewicz had brought the documents to one of their later meetings, Fishman then recalled that there had been some difficulty in getting records because they had been impounded by the Postal authorities and that "it became necessary to get the permission of the Postal authorities and to look at them in some warehouse . . . in which they had stored these materials." Tr. at 97-100. There is no indication in Mr. Fishman's testimony that Mrs. Naleszkiewicz had been present, either in his office or in the warehouse, when documents were examined. Mrs. Naleszkiewicz testified that she recalled that Fishman had asked her husband whether he had copies of bank statements and returned checks and that her husband had replied that he had not searched through his records to find the pertinent checks (Tr. at 526), from which it could be inferred that she attended the first of her husband's meetings with Fishman, to which he had evidently brought no documents. In short, the evidence does not establish that Mr. Fishman and Dr. Naleszkiewicz examined revealing financial records in the applicant's presence.

46. In sum, the evidence indicates that Mrs. Naleszkiewicz did not know prior to January 29, 1990, when she submitted a sworn statement to the FCC denying that she knew of a scheme to defraud Genesis customers, that her husband's story about taking all the January 1989 applications to the Federal Express office was a lie.

47. *The issue concerning the veracity of the applicant's representations regarding the Petitions for Inclusion:* In November 1989 Genesis filed two Petitions for Inclusion with the FCC, requesting that facsimiles of the missing applications be accepted for participation in the lottery drawings for applications filed in the January 1989 filing windows. 7 FCC Rcd at 7620 ¶81 . The petitions, which were subscribed by Dr. Naleszkiewicz, alleged that Dr. Naleszkiewicz had hand-delivered a number of applications to a Federal Express drop-off station on January 5 and 12, 1989 for overnight transmittal to the FCC's Pittsburgh processing center and had Federal Express airbills proving that several packages had been shipped for Genesis on those dates and had been received at the processing center on the next day in each instance. The petitions further alleged that many of those applications were not listed in the lottery notices for the January 1989 filing windows, and speculated that they had been lost at the processing center. Each petition included a verifying affidavit by Dr. Naleszkiewicz and a list of the missing applications that had allegedly been transmitted within the pertinent filing window. CCB Exhs. 1 and 6. The petitions did not include or refer to any statement by Mrs. Naleszkiewicz.

[13] The finding that Mrs. Naleszkiewicz could identify just one inaccuracy in the affidavit, 7 FCC Rcd at 7620 ¶ ¶ 76-77, which the ALJ re-emphasizes in his conclusions, *id.* at 7626 ¶14 1, is erroneous.

48. The Bureau denied the petitions, and Genesis appealed the rulings, but Mrs. Naleszkiewicz withdrew the appeals on February 15, 1990, a few days after her husband had pled guilty and resigned as President of Genesis. 7 FCC Rcd at 7620 ¶ ¶ 85-86, 7621 ¶95. (She reported the terms of the plea agreement to the FCC on March 1, 1990. 5 FCC Rcd at 7133 ¶18.) The parties who had previously challenged Mrs. Naleszkiewicz's character qualfications for the Jewell RSA authorization in light of the indictment of her husband subsequently filed pleadings contending, *inter alia,* that the factual stipulation that she and her husband had endorsed pursuant to the plea agreement belied the factual representations in the Petitions for Inclusion and that Mrs. Naleszkiewicz should be held responsible for the misrepresentations because of her position as an officer of Genesis. *Id.* at 7134 ¶ ¶ 23 and 29. Mrs. Naleszkiewicz replied to this accusation as follows in an affidavit dated March 26, 1990 that was filed with the FCC:

> I played virtually no role in the decision to file [the Petitions for Inclusion] or in determining the contents of those pleadings. I did review the final text only to assure that they were consistent with the facts known to me. I determined that they were.

CCB Exh. 12, p.2. In her direct testimony she said this concerning the same subject:

> My husband himself prepared . . . the company Petitions for Inclusion in the lottery . . . .
>
> . . . .
>
> I did not participate in the drafting of the Petitions nor did I concern myself with their contents, because I didn't believe they pertained to me. I believe I assisted Nancy Wardinski in checking the lists of applicants for whom Genesis was seeking inclusion but that was the extent of my participation. I assumed that [Dr. Naleszkiewicz] was giving the FCC the same explanation that he had given us at Genesis, that the applications had been lost by Federal Express or misplaced by the FCC. I did not know at the time that my husband's affidavits attached to the Petitions were not true.

Applicant Exh. NN, pp. 9-10. Dr. Naleszkiewicz confirmed that his wife's role in preparing the Petitions for Inclusion had been limited to assisting Nancy Wardinski to compile the lists of omitted applications and that he had not discussed the petitions' contents with her. Applicant Exh. VN, pp. 16 and 20. Nancy Wardinski also confirmed that Mrs. Naleszkiewicz had helped her with the lists, and there is no suggestion in her testimony that Mrs. Naleszkiewicz had been otherwise involved. Tr. at 669-70; Applicant Exh. NW, p.4.

49. Nevertheless, the ALJ concluded that in condoning the filing of the Petitions for Inclusion Mrs. Naleszkiewicz had been a knowing accomplice in an attempt to deceive the Commission, 7 FCC Rcd at 7626 ¶ ¶ 142-43, and the Board implicitly concurred. 8 FCC Rcd at 2782 ¶17. As indicated by the lower decisions' rationale, the conclusion rests on two premises: first, that Mrs. Naleszkiewicz knew by November 1989 that her husband had not taken all of the missing applications to the Federal Express office, and second, that she was aware of the entire content of the Petitions for Inclusion at the time of their filing (which the ALJ and the Board inferred from her statement that she had "reviewed the final text [of the Petitions] only to assure that they were consistent with the facts known to me"). *Id.* The first of those two underlying premises is contrary to the evidence, as we have already explained, and the second premise alone, absent evidence that she then had knowledge of pertinent facts other than the identity of the missing applications, does not suffice to sustain the conclusion in question. Hence, we disagree with the findings below that Mrs. Naleszkiewicz knowingly abetted an attempt to deceive the Commission when she helped with preparation of the Petitions for Inclusion.

50. The Review Board also finds Mrs. Naleszkiewicz guilty of two related misrepresentations. First, it charges that she falsely alleged in her affidavit of March 26, 1990 that she had reviewed the Petitions for Inclusion and that all of the representations therein "remained true and accurate." 8 FCC Rcd at 2783 ¶20. This grossly mischaracterizes the evidence. Mrs. Naleszkiewicz did not maintain in the affidavit that the Petitions for Inclusion were or had been truthful; she merely said, rather, that they were consistent with her understanding of the facts at the time of their filing, *i.e.,* in November 1989.[14] CCB Exh. 12, p.2. Thus, the first of the Board's related misrepresentation findings is baseless.

51. The Board's other related finding is that Mrs. Naleszkiewicz "blatantly" contradicted herself by denying in her direct testimony that she had participated in drafting the Petitions for Inclusion after having averred earlier that she had reviewed the petitions and found them consistent with what she knew. 8 FCC Rcd at 2783 ¶20. The Board bases the finding on a selective reading of her words (which are quoted in ¶48 above), ignoring relevant context. She said in the first instance that she had "played virtually no role . . . in determining the contents of those pleadings" but had reviewed them "to assure that they were consistent with the facts known to me." She said in the second instance that she had not participated in drafting the petitions but added that she had helped to check the lists of excluded applications that had been submitted as attachments. She credibly explained at the hearing that her statement in the first instance about reviewing for consistency with facts known to her merely referred to her assistance in checking those lists for accuracy. We do not find that there is any material discrepancy between the statements in question when considered in their immediate contexts and in light of Mrs. Naleszkiewicz's explanatory testimony. Tr. at 529-35 and 581-84.

52. *Concerning the applicant's statements that she did not learn the truth about the missing applications until 1991:* Mrs. Naleszkiewicz testified that even after they signed the plea agreement she continued for awhile to believe that her husband had actually tried to ship all the applications to

[14] Her declaration in the second paragraph of the affidavit in question that "I reaffirm every prior sworn statement of fact" obviously does not refer to the Petitions for Inclusion, which contain no statements from her. It is clear from the literal sense of this averral (one cannot *re* affirm statements that one has not previously affirmed) and from its immediate context that it refers only to the applicant's own prior statements.

the FCC via Federal Express. She explained that, although she remained convinced of his innocence, her husband's criminal lawyers had persuaded her that it would be more prudent for him to accept the plea bargain than go to trial and incur the concomitent risk of being sentenced to a lengthy prison term. She testified that she became doubtful as to his innocence in the fall of 1990 and that she learned early in 1991, while preparing for the hearing in this proceeding, that he had discarded the missing applications instead of taking them to the Federal Express office. Applicant Exh. NN, p.16; Tr. at 520-22 and 547-51.

53. Whether she learned the truth when they signed the plea agreement or not until some later time is not clearly germane to the specified hearing issues. Nevertheless, the Review Board pointedly concluded that her testimony in this regard is belied by testimony of Sheldon Schuman, who was counsel to Genesis and who represented the applicant during the prehearing phase of this proceeding. 8 FCC Rcd at 2785 ¶26 and n.35. As support for this conclusory finding, the Board cites, in the first place, Schuman's testimony at Tr. 916-17 that Mrs. Naleszkiewicz knew that her husband would plead guilty because it seemed in light of the evidence in the prosecutor's possession that a trial would result in conviction -- which does not contradict her own testimony. *Id.* at 2782 n.18. The Board also cites testimony at Tr. 897 that supposedly indicates that Schuman learned on the day when Dr. Naleszkiewicz entered his guilty plea that he had not given the missing applications to the Federal Express. *Id.*. Schuman explained that he came to believe at that time that Dr. Naleszkiewicz had discarded the missing applications because the Doctor had effectively admitted so by pleading guilty and because he had assumed that the plea was sincere. Tr. at 896-97 and 915-16. Consistent with the applicant's testimony, however, Schuman said that Dr. Naleszkiewicz had not told him what had happened to the missing applications until after Mrs. Naleszkiewicz had retained him as counsel in this case and after her husband had been sentenced (which occurred in mid-January of 1991). Tr. at 873-74 and 896. As for what Mrs. Naleszkiewicz thought, Schuman said that he was not sure from her remarks to him at the time of her husband's plea whether she then believed that he was guilty. Tr. at 917. Schuman testified, moreover, that, after she had retained him (which also occurred in January 1991), he had asked Mrs. Naleszkiewicz what had happened to the missing applications and that she had replied that she did not know and told him that she had never closely questioned her husband on the subject. Tr. at 879-80. And Schuman testified that, when Dr. Naleszkiewicz subsequently disclosed that he had thrown the missing applications away, in a private interview at which Mrs. Naleszkiewicz was also present that occurred in April or May of 1991, she had said, "well, that's the first time I heard about it, too." Tr. at 880-82 and 896.

54. Thus, Schuman *corroborated*, rather than contradicted, the applicant's testimony that it was not until "early 1991" that she learned that her husband had discarded the missing applications. Ignoring this, the Board highlights a supposed discrepancy between Mrs. Naleszkiewicz's and Schuman's testimony concerning the time when she was first told precisely *where* her husband had discarded them: she said that she first heard in May 1991 "at the deposition" that he had thrown them in the dumpster, whereas Schuman said that the meeting in which her husband had disclosed this in her presence had occurred as much as three or four weeks prior to her husband's May 1991 deposition session.8 FCC Rcd at 2779 ¶ 7, 2782-83 n.18; Tr. at 521, 882, 898; Applicant Exh. NN, p.16. As it is immaterial when Mrs. Naleszkiewicz learned exactly where the missing applications had been discarded (as opposed to when she learned that her husband had, in fact, discarded them) and doubly immaterial whether she learned this at the deposition session or a few weeks previously, this trivial discrepancy, which no-one called to her attention for comment at the hearing and which might well be due to faulty recollection, hardly supports a finding that she lied in her testimony.

55. *The ALJ's "demeanor" findings:* The ALJ indicated by a subheading that the last three paragraphs of the initial decision pertain to Mrs. Naleszkiewicz's demeanor as a witness. There is no occasion for concern here, however, with the implications of precedential doctrines as to the probative weight of a trial judge's demeanor findings, because, notwithstanding their subcaptioned designation, those three paragraphs do not set forth genuine demeanor findings. They consist, rather, of statements about the substance of recorded testimony and inferences drawn therefrom[15] -- matters which, unlike perceptions of a witness's demeanor, are fully accessible to appellate review. See *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1079, 1084-87 (9th Cir. 1977).

56. *Conclusion:* The evidence of record does not establish (a) that the applicant was an accomplice in the fraud that her husband perpetrated upon clients of their family firm in 1989, (b) that she was culpably involved in the filing of the Petitions for Inclusion, or (c) that she concealed or deliberately misrepresented the facts as she knew them in statements to the Commission in regard to these matters.

II. The veracity of the applicant's stated explanation for the late filing of her notice of appearance

57. As noted in the third paragraph of this opinion, ALJ Kuhlmann summarily dismissed the captioned application prior to the commencement of hearing sessions because, *inter alia*, he concluded from documents obtained through discovery that Mrs. Naleszkiewicz had lied to the Commission by alleging in a motion for acceptance of her late-filed notice of appearance that she had previously been unaware

[15] The ALJ's remark that the applicant "appeared intelligent and able to understand complex questions" (7 FCC Rcd at 7627 ¶14 8) is evidently a general observation about the aptness of her responses to examiners' questions, which is a matter of record. Whether she was "cooperative and forthright" in her hearing testimony, whether she purported to be unable to answer many questions, or whether "her memory faded" as the hearing progressed, as the ALJ asserts in ¶150, are all likewise subject to verification by examination of the hearing transcript. Having closely reviewed the transcript of the applicant's testimony and the other evidence of record, we do not agree that she was an evasive or uncooperative witness.

of the deadline for filing such notices.[16] FCC 91M-1790 (rel. 6-4-91). As also noted, the Review Board affirmed the summary misrepresentation finding and upheld the dismissal order. The Commission vacated the dismissal after ascertaining that the evidence that the ALJ and the Board had cited as grounds for the action did not establish that any statement in the motion for acceptance was false. 7 FCC Rcd 1797, 1799-1800 ¶ ¶ 14-20. We are required to consider the matter anew, however, as the ALJ thereafter added hearing issues addressing it, and on the basis of the hearing record he and the Board have concluded once again that the applicant lied in this respect. 7 FCC Rcd at 7626-277 ¶ ¶ 145-47; 8 FCC Rcd at 2785 n.37.

58. Both in the vacated dismissal orders and in the decisions under review, the ALJ and the Board have based the misrepresentation finding on these undisputed facts: (1) the sixty-second paragrapgh of the hearing designation order (HDO) contains an advisory statement that notices of appearance would be due "within 20 days of the mailing of this order"; (2) the applicant received a copy of the HDO on the day when it was issued, November 26, 1990; (3) the applicant received a letter from William Fishman dated December 7, 1990, in which, after declaring that he would be unable to represent the applicant in this case because of a conflict of interest, Mr. Fishman advised her that whoever she might hire as her attorney for that purpose "should file a Notice of Appearance . . . as provided in Para. 62 of the [HDO]"; and (4) in the context of a letter dated January 3, 1991 soliciting the professional services of attorney Sheldon Schuman, the applicant informed Mr. Schuman that "I need a counsel who has to formally notify the Commission of his intention to appear on my behalf in [this] proceeding." While it was clear from this that the applicant knew by January 3, 1991 that a notice of appearance would have to be entered on her behalf in order to preserve her hearing rights, we pointed out in reviewing the dismissal order that she had never alleged otherwise. She had not asserted that she had been wholly ignorant of the requirement to file a notice of appearance but rather that she had not known until late in January 1991 that there was a filing deadline for such notices that preceded the date set for the prehearing conference. 7 FCC Rcd at 1799 ¶15. Noting, moreover, that there was no evidence that the applicant had read and appreciated the significance of the pertinent statement in the sixty-second paragraph of the nineteen-page HDO or that Fishman had ever informed her that there was a deadline for filing notices of appearance, the Commission held, in direct disagreement with the ALJ and the Board, that there was nothing inherently incredible about her explanation that she had left it up to Schuman, her substitute counsel, to comply with the notice requirement without determining for herself precisely what compliance would entail. *Id.* at ¶16.

59. Although the Commission left open the possibility that the applicant might ultimately be found guilty of misrepresentation in this regard on the basis of a full hearing record, it indicated by its stated reasons for vacating the dismissal order that such a finding could not properly be made merely on the same grounds that had been offered as justification for the summary misrepresentation findings. Yet in reiterating their conclusion that Mrs. Naleszkiewicz lied about her prior ignorance of the notice-filing deadline, the lower decisions rely on precisely the same evidence and rationale as before, without pointing to any new consideration of material importance.[17] Under the circumstances, it is only necessary to add that in our view the hearing record does not establish that Mrs. Naleszkiewicz lied in this regard.

60. ACCORDINGLY, IT IS ORDERED that the reply that Nancy Naleszkiewicz filed on June 18, 1993 IS DISMISSED, that the application for review that Nancy Naleszkiewicz filed on May 26, 1993 IS GRANTED, that the decision of the Review Board, 8 FCC Rcd 2777 (1993) IS SET ASIDE, and that the application of Nancy Naleszkiewicz (File No. 10494-CL-P-430-A-89) for a construction permit IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

I was born and raised in West Virginia where I completed high school.

. . . .

Until I moved to the Washington metropolitan area, I was employed for many years by the C&P Telephone Company of West Virginia.

I met my future husband, Wladimir Naleszkiewicz, in 198[3]. From the very beginning of our relationship he made me feel very comfortable, even though he was well educated and I was not. Wlad told me about the difficulties of his prior life, which included a period in a German concentration camp.

. . . .

We were married on August 28, 1985.

In early 1986, Wladimir resigned from his job at Satellite Systems Engineering to form his own company, The Genesis Enterprises, Ltd. ("Genesis"). I had agreed to take a

[16] The ALJ also held that the motion for acceptance misrepresented a material fact in alleging that the applicant was without legal representation between December 7, 1990 and late January 1991. The Board did not expressly affirm that summary finding, however, and the Commission disavowed it. 7 FCC Rcd at 1799-1800 ¶ ¶ 18-20. Neither of the lower decisions currently under review makes any finding as to the veracity of that allegation, moreover, and we see no basis in the record for an adverse finding in this respect.

[17] The most significant relevant evidence adduced at the hearing that was not considered in the dismissal orders is exculpatory. To wit, the attorney who represented the applicant until December 7, 1990 confirmed in testimony that he had not told Mrs. Naleszkiewicz or her substitute counsel, Sheldon Schuman, about the notice deadline, and Mr. Schuman testified that he, himself, had been unaware of it until late in January 1991 and that upon learning of it he had asked Mrs. Naleszkiewicz whether she had already filed a notice and that she replied that she had not known of the requirement before then. Applicant Exh. WF, p.5; Applicant Exh. SS, p.3; Tr. at 61, 75-76, and 832-33; 7 FCC Rcd at 6623 ¶119.

month's leave from the telephone company to set up the offices at Genesis, but in fact I never returned to my prior job. Wladimir talked me into coming with Genesis, in which he made me Vice President and Secretary. At that time, the FCC was accepting applications for Metropolitan Service Area ("MSA") cellular telephone licenses. Based on Wlad's previous knowledge of the cellular industry from working at Satellite Systems Engineering, Genesis contracted with clients to prepare applications for the upcoming MSA cellular lotteries. From the very beginning, the company successfully filed numerous MSA applications. We started with two employees(Wlad and myself) and ended up with almost thirty.

In general, my husband ran the company, and although I was the Vice President of Genesis, my lack of business knowledge and skill meant that I performed specific and routine administrative tasks such as accounts payable, personnel matters, Workman's Compensation filings, employee insurance matters, and the like. During the MSA filing period, I started to learn about the cellular business from my husband and I was also actively involved in the physical preparation and production of MSA applications. I would sometimes work all night along with the production people helping photocopy and/or assemble the finished applications. Because only Wlad and I had authority to sign checks for Genesis it was later one of my tasks to sign by hand virtually all of the thousands of computer generated FCC fee checks issued by the company for MSA applications. I performed this task only as specifically asked to do so by my husband, who was the only person at Genesis who reviewed, and was informed of, the company's financial status and bank balances. I never inquired, before signing these checks, often hundreds at a time, whether there was sufficient funds in the account to pay them; based on Wladimir's handling of the bank accounts, I just assumed there were.

In April 1987, my husband had quadruple by-pass surgery, at a time when the company was gearing up to file cellular applications for the upcoming MSA lotteries. I was forced to assume the role of acting president of Genesis and manage the day to day business operations, which I did as best I was able for a period of four months during Wladimir's convalescense and before he returned to Genesis full time. Up to that time, I had considered myself a glorified supervisor. I had never known anything about the company's financial management and never really inquired. Our employees were concerned about the fact that Wladimir was seriously ill and were unsure I would be able to run the business. During this interim period, I continued to rely on Wlad so far as possible to make major decisions. Even while he was in the hospital following surgery, and later while he was convalescing at home, I called him or inquired of him whenever necessary for guidance and advice. With the help of others in the company, I was able to keep the company afloat until he recovered and returned to work later in 1987. Thereafter, payroll was added to my duties at Genesis and I returned to my prior limited responsibilities.

The period of my husband's illness in 1987 was the only time that I ran the business until I became its President in February of 1990. In fact, I have no background in the business world, and am quite unsophisicated about business matters. Even as President I have always relied on Wlad and professionals like accountants, lawyers, bankers and others to advise me about all but the most elementary business functions at Genesis. I am, admittedly, an "old-fashioned" wife. I trust my husband's business and financial judgment and do not challenge his decisions. Even today, knowing what I now know, I have faith in him to do what is proper.

From the summer of 1988 until November of that year, I was even less involved in Genesis' operations because I was preoccupied with a personal tragedy in my family. My niece Terri Vaught, whom I had raised as a daughter from age one, developed breast cancer in 1988 at age 27. Earlier in 1988 she learned that she was pregnant. She decided to have the child even though the doctors advised her that the pregnancy would probably accelerate the growth of the cancer.

I was very involved in her illness and saw her daily. I spent the last two and a half months of her life going to work during the day and driving to Johns Hopkins Hospital in Baltimore each night to stay with her until midnight or later. Sometimes I would spend 24 hours with her in the hospital. During this period I was Terri's primary family representative at the hospital and as such interacted continuously with her doctors. Terri gave birth to a son in the seventh month of her pregnancy, and died two weeks later, on November 21, 1988. I handled her funeral arrangements. The shock and pain of her untimely death caused me tremendous emotional distress. For many months after her death, I was unable to concern myself in in any significant way with the daily business affairs of the company.

In November 1988, my husband told me that money was getting tight at the company. To the best of my recollection my husband advised me that additional money was needed to keep the company going after the upcoming filing windows in January, 1989 which were the last RSA filing windows. In December 1988, we took a second mortgage on our home and used the funds to make a stockholder's loan to the company. Part of the loan proceeds was also used to pay the company for the remaining filing fees that I owed for the RSA lotteries which I personally had entered.

. . . .

I was present in the office on January 5, 1989 when my husband took the Genesis client applications for the January 4-6 RSA filing window to the Alexandria Federal Express office. I was assisting other employees in the final packing of the applications, and I recall Wladimir telling me and other employees late in the afternoon that because of the possibility of bad weather between Washington and Pittsburgh, he did not want the young employees to drive to Pittsburgh as they had done for prior RSA filing windows. He stated that he was aware from weather reports that there was the possibility of an ice storm in Pittsburgh, and that the applications would be sent via Federal Express.

To the best of my recollection, the applications were assembled by our staff in the usual manner except that after Wladimir decided to send them by Federal Express, they were reboxed and an extra copy of the transmittal letter was removed from each application envelope. The extra transmittal letter would normally have been stamped at the FCC filing office and brought back by the Genesis employee who drove the applications to Pittsburgh for filing. However, the last minute decision to use Federal Express on January 5th left us insufficient time to prepare hundreds of self-addressed envelopes with postage for the FCC to use in returning stamped transmittal letters to Genesis.

Although on prior occasions the applications were always filed personally by our employees, I accepted my husband's explanation about the weather as a reasonable one because Genesis had a standby plan to use Federal Express in the event of poor winter weather. I therefore did not question his explanation. I had no reason to believe that my husband did not intend to send the applications by Federal Express as he had stated he would do. I was not aware of any difference in the numbers of FCC fee checks signed for the two January filing windows as compared with prior ones.

The applications were assembled by our staff in three to four boxes and at least one separate package, and taken to the front of the office for loading into the trunk of Wlad's automobile. He left alone in his car for the Federal Express Office. When he returned home later that evening, I noticed nothing unusual about his demeanor. For the January 11-13, 1989 RSA filing window my husband told me on January 12th that he had decided again to send the applications by Federal Express. The reason he gave to me was that all but a very few of Genesis' employees were being laid off the next day, and because they might be upset, he said he would prefer to send the applications by Federal Express, rather than risk possible vindictive action by the employees against the company. He explained to the employees, however, that the applications would be again be sent by Federal Express because sending them that way the prior week had gone all right. He may also have mentioned the possibility of bad weather. I recall that there were several separate packages apart from the boxed applications.

My husband went alone to Federal Express, and I was still at Genesis when he returned. I remember nothing unusual about his behavior upon his return.

. . . .

It was Genesis' usual practice to send a confirmatory letter to each of its clients after their applications were filed with the FCC. I never wrote any confirmatory letters. Such letters were always sent after the closing of an RSA filing window, and they were therefore mailed in the case of the January 6 and 13 filing windows pursuant to Genesis' standard practice.

I first became aware that there was a problem with the filing of Genesis' applications at about the time my husband was contacted by Al Waddill, a former Genesis broker and employee, who had contracted with Genesis to file his clients' applications in the two January filing windows. Mr. Waddill came to the office and met with my husband at about the time when the FCC released the October 6, 1989 Lottery Notice, which covered the January 4-6 RSA filing window. They discussed the omission of Mr. Waddill's clients from the lottery notice, and Mr. Waddill was very concerned about a particular partnership in which his wife was a partner. Wladimir had directed Lyn Guin or Nancy Wardinski of our staff to review the lottery notice and mark the Genesis clients on it. My husband's explanation then to me and others was that the applications could have been lost by Federal Express, or lost at the FCC filing office in Pittsburgh and that he would take care of it. He also said that I should not worry, and that he hoped to get the FCC to conditionally include the applications in the lotteries. He did not tell me anything more about this matter than he told the other Genesis employees. We were aware of the chaotic conditions in which the applications were handled at the FCC's Pittsburgh office. We had also heard of a previous occasion on which a Federal Express truck had been hijacked. My husband's explanation therefore seemed reasonable to me.

I do not remember when I first saw the October 20, 1989 Lottery Notice, which covered the applications for the January 11-13, 1989 filing window, but I did become aware that many of Genesis' applications were not on that list. I was concerned, but my husband again said he was taking care of it. He acted surprised, and I recall that he said the second list contained other problems, such as listing certain applicants twice in one market and not in another market.

My husband thereafter contacted William Fishman of Sullivan Worcester, a communications attorney, to discuss what had happened, and Wladimir gave the same explanation to Mr. Fishman as he had given to me. Because of a conflict of interest, Mr. Fishman advised my husband that he was unable to represent our company in any effort to have the omitted applications included in the respective lotteries to be held on December 13, 1989 and December 20, 1989.

My husband himself prepared for the company Petitions for Inclusion in the lottery (one for each lottery) and filed them with the FCC. I believe that he requested copies of Federal Express billings in connection with this effort. I also recall that Genesis had to prepare the client applications for resubmission to the FCC, and I believe I signed the FCC fee checks for them. However, I did not participate in the drafting of the Petitions nor did I concern myself with their contents, because I didn't believe they pertained to me. I believe I assisted Nancy Wardinski in checking the lists of applicants for whom Genesis was seeking inclusion but that was the extent of my participation. I assumed that Wladimir was giving the FCC the same explanation that he had given us at Genesis, that the applications had been lost by Federal Express or misplaced by the FCC. I did not know at the time that my husband's affidavits attached to the Petitions were not true. All I knew was that my husband was doing everything possible to correct the situation which I left entirely in his hands.

On October 23, 1989, our office was searched by the Postal authorities. I was at home at the time. My husband telephoned me and asked that I return to the office, which I did. I was present during the search. My husband initially told me that they had a warrant for his arrest for fraud, but after it was determined that the warrant was not signed, the Postal Insepectors said they would not arrest him that day. At that time I read Postal Inspector Cann's affidavit relating to Mr. Waddill, which was attached to documents shown to Wladimir by the Postal authorities and then shown to me.

. . . .

They were surprised that we had any engineering in the office and that we had had lottery winners. The Postal Inspectors talked to my husband out of my presence. They asked me only what my files contained, and they took any documents dealing with RSAs. I was shocked, very upset and outraged to learn that my husband was being accused of criminal activity. When I later read the criminal complaint, I believed the whole proceeding was an attempt initiated by Mr. Waddill as a competitor to put us out of business.

In December 1989 my husband and Genesis were indicted for mail fraud, and there was also a false statement count against Wladimir. I was never interviewed by the Postal authorities or by the prosecuting attorney after the

search. I was never named as a defendant in the criminal case or informed by the lawyers that the prosecuting attorney sought to name me as a defendant. I did not receive a grand jury subpoena. Because I was never accused of anything, I was not offered a grant of immunity at any time.

In November and December 1989, the FCC denied the Petitions for Inclusion in the lotteries. I picked up the resubmitted applications at the FCC and returned them to the office.

My husband, on behalf of the company, then retained David Irwin, a communications lawyer, to file with the FCC an Emergency Petition for Reconsideration on December 5, 1989, and an Emergency Application for Review and an Emergency Motion for Stay on December 18, 1989. These requests were not granted by the FCC and both lotteries were held without the inclusion of the missing Genesis applications. All I knew at the time was that Wladimir and Mr. Irwin were talking about an appeal, and I took no part in my husband's effort on behalf of the company to include the applications in the lottery. I also was not involved in Mr. Irwin's attempt to obtain an emergency stay of the lottery from the Court of Appeals.

In the meantime, my husband's criminal attorney, Mr. Merril, was preparing for my husband's defense in his criminal case. Although Wlad continued to maintain that he had properly sub-mitted the missing Genesis applications, Mr. Merril and his colleague Mr. Sinclair advised us that Wladimir could well be convicted of the mail fraud counts with a jail sentence of up to 10 years and considerable expenditure on legal fees. Attending to the criminal proceedings, coupled with his attempt to get the applications reinstated, was causing severe stress to my husband. In light of his heart condition, I became very concerned about his health. I advised Mr. Merril that I would do anything that I could to keep Wladimir from going to jail because I knew if he went to jail he would die.

At that time, we were almost out of money and the only thing of immediate value I could offer was my potential RSA permit in Kansas #3. I made this offer for two reasons. First, I wished to help my husband in any way that I possibly could, and second, I felt that restitution should be made to the company's clients whose applications had not been included in the lotteries. In examining what seemed to me to be the only alternative available to accomplish these goals, I initially offered to share with those clients the ownership of my RSA system, once it was built, and this later developed into a plan to transfer my RSA permit to a trustee.

During the high-pressure negotiations involving the plea, the U.S. Attorney's office continued to press for a severe sentence but eventually indicated that if a reasonable restitution plan could be developed, they would move to dismiss all counts except two mail fraud counts against Wlad and to support a lenient sentence rather than to put us through the emotional and financial strain of a trial and a potentially harsh sentence.

Consequently, I agreed to sign a Plea Agreement in which I pledged my RSA permit to be sold by a trustee if it were to be granted.

. . . .

Just before pleading guilty, my husband resigned as Genesis' President. I then became the President, Secretary and Treasurer and the sole director of the company, with my husband helping me as a consultant. At that time I also took on a similar role in Genesis Management. Since then our business has primarily been operated through Genesis Management, and a high proportion of our former RSA cients have continued to use us to prepare and file MMDS applications. Since I have been running the business it has had no problems whatsoever other than those normally encountered in running a small business.

. . . .

[I]n the sentencing hearing on January 18, 1991, a copy of the transcript of which is attached hereto as Exhibit NN-1(j), the prosecuting attorney indicated that:

MR. CASSELL: ..."I think that I should clarify just one point about the nature of the offense. As Mr. Merril indicated, we view this as essentially a crime of desperation by Dr. Naleszkiewicz. That Mrs. Naleszkiewicz did not have anything to do with it as far as the Government had determined from its evidence. That as a legitimate business, large amounts of money were moving through the general business accounts of Genesis. At the end of the filing period Dr. Naleszkiewicz essentially came up short, and at that time contrived a plan and concealed it from everyone and, as far as we could tell, concealed it from his wife as well. He loaded all these applications into the car, told everyone he was driving off to Federal Express to mail them to FCC, when in fact that didn't happen.

He also concealed this from the accountant in terms of indicating that the checks had been paid when in fact they had not been. He acted alone in all this without the knowledge or assistance of his wife.

And I should point out that the Probation Office after independently reviewing all the facts of this case reached the same conclusion, finding in paragraph 30 of the presentence report that Dr. Naleszkiewicz was, quote, solely responsible, close quote, for this activity.

I just wanted to bring that to the Court's attention."

Transcript of Sentencing Hearing, pp. 7-8.[18]

On numerous previous occasions in the course of this proceeding, I have denied under oath any knowledge of wrongdoing at Genesis, and any participation therein. I

[18] The ALJ refused to admit into evidence the foregoing quotation or the complete copy of the transcript of the sentencing hearing tendered as Attachment 1(j) to the applicant's written direct testimony because, in his judgment, the prosecutor's conclusory opinions as to the significance of evidence available to him were of no probative value in this proceeding. Tr. at 111, 118-20, and 129-30. As a certified copy of an official record of the U.S. District Court for the Eastern District of Virginia setting forth an official's finding based on an investigation conducted pursuant to authority granted by law, however, Attachment 1(j) was admissible regardless of the availability of declarants for cross examination, according to §803(8) of the Federal Rules of Evidence, and we have taken notice of it because we do not agree that it is utterly devoid of probative import. See *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988). Although it is by no means a crucial factor in our view -- which is to say, we would have decided this case no differently had we been unaware of it -- the fact that the counsel for the United States declared to the court at Dr. Naleszkiewicz's sentencing hearing that it appeared from the evidence amassed by the prosecution that the defendant had acted alone in perpetrating the fraud, without the knowledge or assistance of his wife, is a relevant circumstance that tends to confirm the conclusions that we have drawn from the hearing record.

reaffirm those denials in this testimony. I now am aware that my husband did not file the bulk of the January applications as he claimed to have done. After the Plea Agreement was signed in February 1990 and I became President of Genesis, I decided there was no sense in continuing to push the FCC to reinstate the applications. The FCC had already rejected the petitions for inclusion and the company was low on funds. Mr. Irwin prepared a letter to withdraw Genesis's pending pleadings and requests, I signed it and it was submitted to the FCC on February 15, 1990.

. . . .

I have always trusted my husband completely and had complete faith in his honesty, his integrity, and his ability to run Genesis' business. When he insisted to me that he had duly filed the applications for the January 1989 RSA windows, I believed him; I did not question him and I conducted no independent investigation. It would have been out of character for me to do so. Although I knew that my husband had admitted in the Plea Agreement that he had not filed most of the applications, I simply did not believe it and thought he had signed the Plea Agreement in the hopes of avoiding a maximum sentence. I learned only after the Plea Agreement had been entered into, and then only in stages, that in fact my husband had thrown certain of those applications away. I began to question him in the fall of 1990, learned in early 1991 that he had discarded the applications, and found out in May 1991 about his throwing them in the dumpster.

I was deeply disappointed to learn that he had been lying to me for so long. Today, I understand why he did it, that in part he was protecting me from unpleasant realities and that he may have thought, however erroneously, that the failure to file could be remedied later by offering substitute applications or some other form of compensation. I understand also why he compounded the offense by being dishonest with Genesis's employees, clients and outside professionals. But to say I understand is not to condone what he did; it was wrong, there was no excuse for it, and had he been honest with me at the point when he was considering trashing the applications, as well as later when he was attempting to get the applications reinstated, I would have moved heaven and earth to try to stop him and to help him preserve his good name and that of our company.

None of that, however, diminishes the facts: I never knew of his plan or his wrongful conduct until long after the events in question had occurred. I may have been too trusting; I may have been naive, and I may be criticized as an inexperienced businesswoman. I did not, however, participate in, or have any knowledge of my husband's failure to file the applications in question, nor did I knowingly participate in any cover up or any subsequent misrepresentation with respect to this matter.

. . . .

I realize that resolution of this case turns on the believability of my testimony , and that it may be somewhat difficult to accept my explanation that I knew nothing of any improper activities. Yet that is the simple truth. To prove it, in response to the discovery motions and pleadings filed by CFL and PNC, I have opened all of the records of the company and myself for inspection. We produced copies of over 500 documents and allowed all of our records to be inspected. CFL had two attorneys and one paralegal in our offices for five days going over our records. They also sent out over 14,000 documents to be copied for later review. My records were also reviewed by the attorney for PNC and the Common Carrier Bureau. Written interrogatories and depositions were conducted on me, and depositions were taken of my husband, our CPA and various Genesis employees - present and former. So that there would not be even an appearance of withholding anything, I instructed my attorney not to raise the attorney client privilege as to any documents contained in our files.

. . . .

Applicant Exh. NN, pp. 1-17.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

John H. White File No. BPH-910122MB

For a Construction Permit for a
New FM Station
La Crosse, Wisconsin

MEMORANDUM OPINION AND ORDER

Adopted: January 6, 1995; Released: February 3, 1995

By the Commission:

1. On March 1, 1994, the Commission denied the Application for Review filed on behalf of Mr. White, a former applicant for a new FM station at La Crosse, Wisconsin, which sought reinstatement of his application and acceptance of his late filed hearing fee *nunc pro tunc*. *John H. White*, 9 FCC Rcd 1016 (1994). The Commission, however, did not address Mr. White's Supplement to Application for Review therein. Mr. White's appeal of the Order denying his Application for Review was remanded to the Commission at our request in order to address the issue raised in the Supplement to Application for Review. *See White v. FCC*, No. 92-1279 (D.C. Cir., filed March 30, 1994) (Order filed July 5, 1994). Thus, the Commission is now considering Mr. White's Supplement to Application for Review.

2. In his Supplement to Application for Review, Mr. White cited *Martin W. Hoffman, Esq.* ("Astroline") (Man. Dir. April 23, 1993), as support for his argument that the Commission should have waived the July 15, 1991 hearing fee deadline and reinstated his application. *Martin W. Hoffman, Esq.* is easily distinguishable from the instant case. *Martin W. Hoffman, Esq.* involved a comparative renewal proceeding, in which the license was being held by a trustee in bankruptcy. The decision waived the hearing fee deadline, in recognition of the fact that as a trustee in bankruptcy the applicant's position before the Commission is somewhat unique, that strict adherence to the Commission's procedural rules would have frustrated the trustee's statutory mission under the bankruptcy laws, and that the underlying purpose of the hearing fee deadlines was to "expedite the comparative process for *new broadcast facilities* 'by encouraging more and/or earlier settlement'" (emphasis added) (citation omitted) and thus was not as applicable in a comparative renewal context. In the instant case, Mr. White was an applicant for a new FM station, and none of the countervailing considerations which warranted waiver in *Martin W. Hoffman, Esq.* are present here. Thus, Mr. White's reliance upon *Martin W. Hoffman, Esq.* is unavailing.

3. The dismissal of Mr. White's FM application was consistent with the Commission's treatment of a similarly situated applicant for a new FM station that failed to file its fee in accordance with the applicable July 15, 1991 hearing fee deadline. *See Gerald E. Davis and Jo Ann Dunn d/b/a Piketon Communications*, 9 FCC Rcd 3016 (1994), *appeal pending, Davis v. FCC*, No. 94-1525 (D.C. Cir., filed July 26, 1994). Moreover, the dismissal of Mr. White's application was consistent with the Commission's pronouncements that absent timely tendered fee payments, applications are subject to immediate dismissal. *See Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 158 (1990); *Establishment of a Fee Collection Program*, 2 FCC Rcd 947, 956-57 (1987); *see also* 47 U.S.C. Section 158(c)(2); 47 C.F.R. Sections 1.1107, 1.1110.

4. Accordingly, IT IS ORDERED, that the Supplement to the Application for Review, filed by Mr. White, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Personal Communications
Washington-Baltimore MTA #10
Frequency Block A — File No. 15000-CW-L-94

Cox Cable Communications, Inc.
Los Angeles-San Diego MTA #2
Frequency Block A — File No. 15001-CW-L-94

Omnipoint Communications, Inc.
New York MTA #1
Frequency Block A — File No. 15002-CW-L-94

For Initial Authorizations
in the Broadband
Personal Communications Service

MEMORANDUM OPINION AND ORDER

Adopted: December 13, 1994 Released: December 14, 1994

By the Commission: Chairman Hundt and Commissioner Chong not participating.

I. INTRODUCTION

1. By this action, pursuant to the recently enacted legislation regarding the General Agreement on Tariffs and Trade (GATT),[1] we grant the applications filed by American Personal Communications (APC), Cox Cable Communications, Inc. (Cox), and Omnipoint Communications, Inc. (Omnipoint) for 2 GHz personal communications services (broadband PCS) licenses based upon their pioneer's preference awards. In addition, we condition those licenses as directed by the Commission[2] and as required by the GATT Act. Finally, consistent with the GATT Act, we dismiss as moot the petitions to deny filed against the applications of APC, Cox, and Omnipoint.[3]

II. BACKGROUND

2. In October 1992, the Commission tentatively granted pioneer's preferences to APC, for its development and demonstration of technologies to facilitate spectrum sharing by PCS and microwave users at 2 GHz; to Cox for its development and demonstration of PCS/cable plant interface technology and equipment that result in spectrum-efficient provision of PCS services; and to Omnipoint for its development of 2 GHz equipment that utilizes advanced techniques that will facilitate the continued development and implementation of PCS services and technologies.[4] In December 1993, the Commission granted final pioneer's preferences to APC, Cox, and Omnipoint.[5] The Commission determined that, if otherwise qualified, APC would be licensed to use Channel Block A in the Major Trading Area (MTA) that includes Washington, D.C. and Baltimore, Maryland (Washington-Baltimore MTA); Cox would be licensed to use Channel Block A in the MTA that includes San Diego, California (Los Angeles-San Diego MTA); and Omnipoint would be licensed to use Channel Block A in the MTA that includes northern New Jersey (New York MTA (including northern New Jersey)).[6] In granting these pioneer's preferences, the Commission directed the licensing bureau to condition any 2 GHz PCS license obtained through the pioneer's preference process upon the licensee's building a system that substantially uses the design and technologies upon which the preference award was based.[7] The licenses are to be further conditioned upon the licensee's holding the license for a minimum of three years or until the construction requirements applicable to the five-year build-out period have been satisfied, whichever occurs first.[8] APC's, Cox's and Omnipoint's applications were accepted for filing on August 25, 1994.[9] Petitions to deny and responsive pleadings were filed with the Commission.[10]

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[1] The President signed the GATT legislation into law on December 8, 1994. *See* Uruguay Round Agreements Act of 1994, Pub. L. No. 103-465, Title VIII, 108 Stat. 4809 (enacted Dec. 8, 1994) (to be codified at 47 U.S.C. § 309(j)(13)) ("GATT Act"). Section 801 ("Pioneer Preferences") of the GATT Act is effective upon enactment and applies to any licenses issued on or after August 1, 1994 pursuant to the pioneer's preference program. *See* Section 801 of the GATT Act (to be codified at 47 U.S.C. § 309(j)(13)(G)).

[2] *See* Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, Third Report and Order, 9 FCC Rcd 1337 (1994) (*Third R&O*).

[3] *See* Petitions to Deny filed Against Broadband PCS Applications, Public Notice, Mimeo No. 50180 (Oct. 13, 1994).

[4] Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, Tentative Decision and Memorandum Opinion and Order, 7 FCC Rcd 7794, 7797-7804 (1992).

[5] *Third R&O*, 9 FCC Rcd 1337, ¶ ¶ 10-36 (APC), ¶ ¶ 37-50 (Cox), and ¶ ¶ 51-74 (Omnipoint).

[6] *Id.*, 9 FCC Rcd at 1349, ¶ 80.

[7] This condition applies only in the service area for which the preference is granted and only for the initial five-year build-out period specified in the broadband PCS rules. *Id.*, 9 FCC Rcd at 1339, ¶ 8.

[8] *Id.* at ¶ 9.

[9] Announcement of Acceptance of Broadband PCS Applications, Public Notice, Report No. CW-94-1 (Aug. 25, 1994).

[10] With regard to APC, petitions to deny were filed by Advanced Cordless Technologies, Inc. (ACT) and Bell Atlantic Personal Communications, Inc. (Bell Atlantic) on September 26, 1994. With regard to Cox, petitions to deny were filed by of Bell Atlantic, ACT, and Pacific Bell and Pacific Bell Mobile Services on September 26, 1994. With regard to Omnipoint, petitions to deny were filed by Bell Atlantic, ACT and Cablevision Systems Corporation on September 26, 1994. In addition, a number of these parties have filed letters with regard to the applications of APC, Cox, and Omnipoint.

3. Section 801 of GATT Act amends Section 309(j) of the Communications Act to require that the Commission recover a portion of the value of a pioneer's preference recipient's license and adopted a payment formula to eighty-five percent (85%) of the adjusted value of the license,[11] calculated based upon the average per population price established by competitive bidding for Channel Blocks A and B in the twenty largest MTAs that do not include MTAs awarded to the pioneers.[12] In addition, the Commission is directed to permit guaranteed installment payments over a period of 5 years with payment only of interest on unpaid balances during the first 2 years. Payment by the pioneers is to commence not later than the later of (i) 30 days after award of the pioneer's preferences and licenses is no longer subject to administrative or judicial review or (ii) the date of completion of the auction of the comparable licenses.[13] The payment of unpaid balances and interest after the first 2 years is to be in accordance with the Commission's rules.[14] The legislative history indicates that payment of the principal and interest should be "in a manner consistent with the installment payment rules adopted by the Commission as part of its general competitive bidding regulations."[15] In addition, the House Committee Report "anticipate[d] that the Commission will calculate interest payments based on the prevailing prime rate."[16] The Commission is required to collect not less than $400,000,000 from the broadband pioneers for their licenses. Should the initial recovery amount be less than $400,000,000, the Commission shall recover the additional amount by allocating the difference between the amount collected and $400,000,000 among the holders of the broadband pioneers' licenses based upon the population of the license areas of each licensee.[17]

4. The GATT Act also requires that the Commission not delay the grant of licenses to the broadband pioneers based upon their pioneer's preference awards "more than 15 days following the enactment of this paragraph, and the award of such preferences and such licenses shall not be subject to administrative or judicial review."[18] Accordingly, such licenses must be granted by December 23, 1994.

III. DISCUSSION

5. The enactment of the GATT Act has rendered moot any petitions to deny filed against the applications of APC, Cox, and Omnipoint. Indeed, the Commission has recently found that the GATT Act rendered moot any further Commission action on the three 2 GHz broadband personal communications services (PCS) pioneer's preferences granted in the *Third R&O*.[19] Nothing in the GATT Act, however, has eliminated the conditions that the Commission, in the *Third R&O*, directed the licensing bureau to impose upon the licenses awarded to APC, Cox, and Omnipoint. Accordingly, we will condition each license to (i) require each licensee to build a system that substantially uses the design and technologies upon which its preference award was based;[20] and (ii) require each licensee to hold the license for a minimum of three years or until the construction requirements applicable to the five-year build-out period have been satisfied, whichever occurs first.[21] We note that should APC, Cox, and Omnipoint fail to comply with these or any other conditions of their licenses, the Commission has available to it the full range of sanctions, including, for example forfeiture and/or license cancellation.[22]

6. In addition, we will condition each license with the payment requirement set forth in the GATT Act. Accordingly, each licensee will be required to pay to the United States Treasury an amount equal to 85% of the adjusted value of its license, calculated based upon the average per population price established by competitive bidding for Channel Blocks A and B in the twenty largest MTAs that do not include MTAs awarded to the pioneers in accordance with Section 801 of the GATT Act.[23] The details of the payment obligation, including installment amounts and interest calculation, will be addressed in a separate order after completion of the broadband PCS auction that commenced December 5, 1994.

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[11] Section 801 of the GATT Act (to be codified at 47 U.S.C. § 309(j)(13)(B)). The formula requires identification of the winning bids for licenses that are most reasonably comparable to those awarded to pioneers, excluding licenses that the Commission determines are subject to bidding anomalies due the award of a preference. The winning bids are then divided by the population of its service area, which is defined as the "per capita bid amount." The average per capita bid is then computed for the reasonably comparable licenses. The average amount is reduced by 15 percent and then multiplied by the population of the service area of the pioneer.

[12] *See* Section 801 of the GATT Act (to be codified at 47 U.S.C. § 309(j)(13)(E)(iii)).

[13] *See* Section 801 of the GATT Act (to be codified at 47 U.S.C. § 309 (j)(13)(E)(iv)(I)). The auction of the comparable licenses commenced on December 5, 1994. FCC's First Broadband PCS Auction Opens, News Release (Dec. 5, 1994).

[14] *See* Section 801 of the GATT Act (to be codified at 47 U.S.C. § 309(j)(13)(E)(iv)(II)).

[15] H. Rep. No. 826, Part 2, 103d Cong., 2d Sess. 8 (1994).

[16] *Id.*

[17] *See* Section 801 of the GATT Act (to be codified at 47 U.S.C. § 309(j)(13)(E)(v)). This amount is exclusive of interest on unpaid balances.

[18] Section 801 of the GATT Act (to be codified at 47 U.S.C. § 309(j)(13)(E)(i)).

[19] Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, FCC 94-304, Memorandum Opinion and Order, 9 FCC Rcd _____, at ¶ 1 (adopted and released: December 2, 1994) (footnotes omitted) (MO&O) (denying petitions for reconsideration of and affirming the Commission's denial of certain pioneer's preferences requests). The Commission also stated that the GATT "legislation mooted any challenges to the grants made and the payment required." MO&O at n.3.

[20] This condition applies only in the service area for which the preference is granted and only for the initial five-year build-out period specified in the broadband PCS rules. *Third R&O*, 9 FCC Rcd at 1339, ¶ 8.

[21] *Id.* at ¶ 9.

[22] *See* 47 U.S.C. §§ 312 and 503.

[23] *See* Section 801 of the GATT Act (to be codified at 47 U.S.C. § 309(j)(13)(E)(iii)).

IV. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that the Petitions to Deny the above-captioned applications filed by Advanced Cordless Technologies, Inc., Bell Atlantic Personal Communications, Inc., Pacific Bell and Pacific Bell Mobile Services, and Cablevision Systems Corporation on September 26, 1994 ARE DISMISSED.

8. IT IS FURTHER ORDERED that the application of American Personal Communications (File No. 15000-CW-L-94) IS GRANTED, subject to the following conditions:

1. This authorization requires that American Personal Communications shall construct a 30 MHz broadband Personal Communications Services system on Frequency Block A (1850-1865 MHz/1930-1945 MHz) in the Washington-Baltimore MTA that substantially uses the design and technology upon which the pioneer's preference award to American Personal Communications was based. This condition expires upon meeting the five-year build-out requirement in 47 C.F.R. §24.203(a);

2. This authorization requires that American Personal Communications shall retain control of the license for at least three years from the initial license grant date or until the grantee has met the five-year build-out requirement of 47 C.F.R. § 24.203(a);

3. This authorization requires that American Personal Communications shall pay to the United States Treasury an amount equal to eighty-five percent (85%) of the adjusted value of its license calculated in accordance with Section 801 of the Uruguay Round Agreements Act of 1994, Pub. L. No. 103-465, Title VIII, 108 Stat. 4809 (enacted Dec. 8, 1994) (to be codified at 47 U.S.C. § 309 (j)(13)) and with a subsequent order specifying payment procedures and amounts thirty (30) days after this Memorandum Opinion and Order and the order granting American Personal Communications a pioneer's preference become final orders, that is, the orders are no longer subject to administrative reconsideration or judicial review, appeal, or stay.

9. IT IS FURTHER ORDERED that the application of Cox Cable Communications, Inc. (File No. 15001-CW-L-94) IS GRANTED, subject to the following conditions:

1. This authorization requires that Cox Cable Communications, Inc. shall construct a 30 MHz broadband Personal Communications Services system on Frequency Block A (1850-1865 MHz/1930-1945 MHz) in the Los Angeles-San Diego MTA that substantially uses the design and technology upon which the pioneer's preference award to Cox Enterprises, Inc. was based. This condition expires upon meeting the five-year build-out requirement in 47 C.F.R. §24.203(a);

2. This authorization requires that Cox Cable Communications, Inc. shall retain control of the license for at least three years from the initial license grant date or until the grantee has met the five-year build-out requirement of 47 C.F.R. § 24.203(a);

3. This authorization requires that Cox Cable Communications shall pay to the United States Treasury an amount equal to eighty-five percent (85%) of the adjusted value of its license calculated in accordance with Section 801 of the Uruguay Round Agreements Act of 1994, Pub. L. No. 103-465, Title VIII, 108 Stat. 4809 (enacted Dec. 8, 1994) (to be codified at 47 U.S.C. § 309 (j)(13)) and with a subsequent order specifying payment procedures and amounts thirty (30) days after this Memorandum Opinion and Order and the order granting Cox Enterprises, Inc. a pioneer's preference become final orders, that is, the orders are no longer subject to administrative reconsideration or judicial review, appeal, or stay.

10. IT IS FURTHER ORDERED that the application of Omnipoint Communications, Inc. (File No. 15002-CW-L-94) IS GRANTED, subject to the following conditions:

1. This authorization requires that Omnipoint Communications, Inc. shall construct a 30 MHz broadband Personal Communications Services system on Frequency Block A (1850-1865 MHz/1930-1945 MHz) in the New York MTA that substantially uses the design and technology upon which the pioneer's preference award to Omnipoint Communications, Inc. was based. This condition expires upon meeting the five year build-out requirement in 47 C.F.R. §24.203(a);

2. This authorization requires that Omnipoint Communications, Inc. shall retain control of the license for at least three years from the initial license grant date or until the grantee has met the five-year build-out requirement of 47 C.F.R. § 24.203(a);

3. This authorization requires that Omnipoint Communications shall pay to the United States Treasury an amount equal to eighty-five percent (85%) of the adjusted value of its license calculated in accordance with Section 801 of the Uruguay Round Agreements Act of 1994, Pub. L. No. 103-465, Title VIII, 108 Stat. 4809 (enacted Dec. 8, 1994) (to be codified at 47 U.S.C. § 309 (j)(13)) and with a subsequent order specifying payment procedures and amounts thirty (30) days after this Memorandum Opinion and Order and the order granting Omnipoint Communications a pioneer's preference become final orders, that is, the orders are no longer subject to administrative reconsideration or judicial review, appeal, or stay.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Telemundo Group, Inc.,
Debtor in Possession
(Transferor)

and

Telemundo Group, Inc.
(Transferee)

For Transfer of Control of

Telemundo of Puerto Rico, Inc., Licensee of	
WKAQ-TV, San Juan, P.R.	File Nos. BTCCT-940922KI
W09AT, Fajardo, P.R.	BTCTTV-940822KJ
W32AJ, Utuado, P.R.	BTCTT-940822KK
W68BU, Adjuntas, P.R.	BTCTT-940822KL
Telemundo of Florida, Inc., Licensee of	
WSCV(TV), Fort Lauderdale, FL	BTCTT-940822KM
Telemundo of Northern California, Inc., Licensee of	
KSTS(TV), San Jose, CA	BTCCT-940822KN
K15CU, Salinas, CA	BTCTTL-940822KO
K52CK, Stockton/Lodi, CA	BTCTTL-940822KP
K47DQ, Sacramento, CA	BTCTTL-940822KQ
K27EI, Santa Maria, CA	BTCTTL-940822KR
K39DH, Ogden, UT	BTCTT-940822KS
K48EJ, Salt Lake City, UT	BTCTTL-940822KT
W32AY, Boston, MA	BTCTTL-940822KU
K61FI, Modesto, CA	BTCTTL-940822KV
Telemundo of Galveston-Houston, Inc., Licensee or Permittee of	
KTMD(TV), Galveston, TX	BTCCT-940822KX
K60EE, Odessa, TX	BTCTTL-940822KY
K49CD, Odessa, TX	BTCTTL-940822KZ
K40DX, Abilene, TX	BTCTTL-940822LA
K36DV, Amarillo, TX	BTCTTL-940822LB
Telemundo of San Antonio, Inc., Licensee of	
KVDA(TV), San Antonio, TX	BTCCT-940822LE
Telemundo of Austin, Inc., Licensee of	
K11SF, Austin, TX	BTCTVL-940822LF
Telemundo of Colorado, Inc., Licensee of	
K49CJ, Colorado Springs, CO	BTCTTL-940822LG
Telemundo of Santa Fe, Inc., Licensee of	
K52BS, Santa Fe, NM	BTCTTV-940822LH
WNJU License Corporation, Licensee of	
WNJU, Linden, NJ	BTCCT-940822KW
Estrella License Corporation, Licensee of	
KVEA(TV), Corona, CA	BTCCT-940822LC
K57CD, San Diego, CA	BTCTTL-940822LD

MEMORANDUM OPINION AND ORDER

Adopted: December 23, 1994; Released: December 23, 1994

By the Commission:

1. The Commission has before it for consideration the unopposed applications for transfer of control of the above-captioned licensees from Telemundo Group, Inc., Debtor in Possession ("Debtor") to Telemundo Group, Inc. ("Reorganized Telemundo"), the entity set to emerge from federal bankruptcy protection pursuant to a Chapter 11 plan of reorganization confirmed by the United States Bankruptcy Court for the Southern District of New York. *See Order Pursuant to Section 1129 of the Bankruptcy Code Confirming the Debtor's Second Amended Chapter 11 Plan of Reorganization (Bankruptcy Order)*, Case No. 93-B-42967 (Bankr. S.D. N.Y. July 20, 1994). Because principals or affiliates of some of the proposed attributable stockholders of Reorganized Telemundo hold conflicting attributable interests in other broadcast stations, as well as a nonattributable interest in a television station in the same market as a Reorganized Telemundo television station, the applicants also request relief from the Commission's multiple ownership rules and cross-interest policy.

BACKGROUND

2. Debtor, a Delaware corporation, owns Telemundo, one of two major Hispanic broadcast television networks serving the United States. Through its seven full power television stations and 19 low power television and translator stations, according to Debtor, Telemundo serves more than 50 markets in the United States and Puerto Rico, reaching more than 85 percent of all Hispanic households in the country. Additionally, Debtor produces Spanish-language programming, making available to its affiliates and owned and operated stations approximately 130 hours per week of such programming.

3. For nearly three years, according to the applicants, Debtor has failed to make principal or interest payments on its outstanding debt. In August 1993, Telemundo petitioned for Chapter 11 bankruptcy protection and thereafter sought Commission approval for an involuntary transfer of control of its licensee subsidiaries to Debtor. *See* FCC File Nos. BTCTTV/BTCTT/BTCTTL-940810KF through KZ

(granting transfer of control of the licensee subsidiaries from Telemundo Group, Inc. to Debtor). A second amended plan of reorganization (the "Plan") structured by Debtor and accepted by those creditors entitled to vote thereon was confirmed by the bankruptcy court on July 20, 1994. *See Bankruptcy Order, supra.* Under the Plan, the claims of certain creditors are to be discharged in exchange for, among other things, an equity stake in Reorganized Telemundo.

4. Upon consummation of the Plan, which is subject to Commission approval, the capital stock of Reorganized Telemundo will consist entirely of voting common stock, whose holders will be: TLMD Partners II, L.L.C. (15.5%); Reliance Insurance Company (10%); Bastion Capital Fund, L.P. (up to approximately 16%); Leon Black (approximately 2-8%);[1] and various rights holders and other creditors, none of which individually will hold an attributable 5% interest (approximately 50%). The composition of Reorganized Telemundo's initial nine-member board of directors results from negotiations among Debtor, its current majority stockholder, and the junior and senior creditors.[2]

5. With four exceptions, the corporate restructuring and the involvement of parties to this application are consistent with the Commission's ownership rules and policies, as well as with the Communications Act. Those exceptions are as discussed below. Permanent waiver of the one-to-a-market rule

6. Daniel D. Villanueva is a co-trustee of the Daniel Villanueva Living Trust, which is the sole stockholder of one of the two general partners of Bastion Partners which, in turn, serves as the sole general partner of Bastion Capital Fund, L.P. ("Bastion Capital"). The potentially 16 percent of Telemundo stock owned by Bastion Capital is, therefore, attributable to Mr. Villanueva, who wholly owns BuenaVentura Communications, Inc., the licensee of KCTQ(AM), Thousand Oaks, California. Because the Grade A signal of Debtor's KVEA(TV), Corona, California, encompasses the entire community of Thousand Oaks, Villanueva's ownership of the radio station and his attributable interest in the television station would be inconsistent with the one-to-a-market rule. That rule bars common ownership of television and radio stations in the same market. *See* 47 C.F.R. §73.3555(c).

7. In *Second Report and Order* in MM Docket No. 87-7, 4 F.C.C. Rcd 1741, 1751, *reconsidered in part,* 4 F.C.C. Rcd 6489 (1989), the Commission concluded that it will "look favorably" upon, and will be "predisposed to grant," waiver requests involving radio and television station combinations in the top 25 markets, as defined by Arbitron Ratings Company, where at least 30 separately owned, operated and controlled broadcast licensees, or "voices," will remain after the proposed combination. In calculating the number of broadcast stations in a particular market, we include all commercial and noncommercial full-power television station licensees in the relevant ADI and all operating AM and FM radio station licensees in the relevant television metropolitan market. *Id.* The number of "voices" in a given market is evaluated in accordance with the attribution provisions of our local ownership rules, in which persons have a "cognizable" interest in a broadcast station if they serve as an officer, director, partner, or owner of at least five percent of the voting stock of the licensee. *Id.; see also id.* at 1759 n.87.

8. In support of its waiver request, Debtor notes that Los Angeles, the ADI within which each station is located, is the second largest market in the country, as reported in *Broadcasting & Cable Yearbook 1994.* That market sustains 21 full-service television stations and 79 AM and FM radio stations. Of these broadcast stations, Debtor's exhibit indicates, at least 80 will be separately owned, operated and controlled after consummation of the Plan. Accordingly, Debtor contends, its waiver request for the Los Angeles market satisfies the "top 25 markets/30 voices" presumptive waiver standard set forth in *Second Report and Order.*

9. Having reviewed the showing submitted by Debtor, we find that Mr. Villanueva's common ownership interests will not result in fewer than 30 separately owned, operated and controlled broadcast stations in Los Angeles, the second largest market. Thus, Debtor has provided the necessary documentation to meet the "top 25 markets/30 voices" standard with regard to the KVEA(TV)-KCTQ(AM) combination.[3] We conclude, therefore, that grant of the waiver permitting Mr. Villanueva to hold interests in both stations is in the public interest.

Temporary waiver of the duopoly rule

10. Mr. Villanueva also wholly owns Villanueva Media, Inc., which holds a 20% general partnership and 55% limited partnership interest in KSMS-TV, L.P., the licensee of KSMS-TV, Channel 67, Monterey, California. Because the Grade A contour of KSMS-TV overlaps with that of Reorganized Telemundo's KSTS(TV), Channel 48, San Jose, California, Mr. Villanueva's attributable interests in

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[1] Earlier, the applicants had proposed that 24.5% of the voting common stock of Reorganized Telemundo would be owned by TLMD Partners II, L.L.C. ("TLMD"), an entity composed ultimately of members John J. Hannan and Michael D. Weiner, which would receive the stock pursuant to claims received from AIF II, L.P. ("AIF") and Artemis America III, L.L.C. ("Artemis"). However, in amendments filed on December 19 and 20, 1994, the applicants represent that AIF and Artemis will comprise the complete membership of TLMD, in lieu of intervening members TLMD partners IA, L.L.C. and TLMD partners IB, L.L.C. and of ultimate members Hannan and Weiner. And TLMD will reduce its proposed interest in Reorganized Telemundo to approximately 15.5% of that company's stock. The remaining 9% stock TLMD was to own will be acquired for cash separately by Bastion Capital and Leon Black, the specific percentages of which are not yet known. As stated in the amendments, Bastion Capital will acquire up to 7% of that 9% TLMD stock interest, which, when added to its initial proposed interest of 6.8% to 9.4%, will total up to 16.6%. Black, who was not originally scheduled to acquire an interest, will acquire between 2% and 8% of that 9% TLMD stock interest.

[2] The initial, bankruptcy court-approved board members of Reorganized Telemundo, all U.S. citizens, were designated by Debtor's current management (Joaquin F. Blaya), Reliance Insurance Company (George E. Bello and Saul P. Steinberg), the junior creditors (Alan Kolod), and the senior creditors (John J. Hannan and Bruce H. Spector for TLMD Partners II, L.L.C, John Juran and Guillermo Bron for Bastion Capital Fund, L.P., and Leon Black for himself).

[3] As Debtor contends, we note that the bankrupt status of KVEA(TV) entitles Debtor to qualify for a presumptive waiver on a second ground, the "failed station" standard, as detailed in *Second Report and Order,* 4 F.C.C. Rcd at 1752-53.

these stations would violate the Commission's duopoly rule, Section 73.3555(b). The duopoly rule prohibits common ownership of television stations whose Grade B contours overlap. Accordingly, in its application, Debtor requests a temporary, twelve-month waiver of the duopoly rule "to permit an orderly disposition" of KSMS-TV. To that end, Debtor notes in its November 2, 1994 amendment that an application for the assignment of KSMS-TV to California Heartland Broadcasting, Inc. was filed with the Commission on September 23, 1994. FCC File No. BALCT-940913KX.[4]

11. In evaluating requests for waiver of the duopoly rule, whether on a permanent or temporary basis, the Commission looks to several factors: (1) the size of the overlap area and the population within that geographic area; (2) the separateness of the markets within which the two stations are located; (3) the diversity of voices available to the population residing within the overlap area; (4) the resulting concentration of economic power; (5) the independence of the stations' operations; and (6) any public interest benefits emanating from the proposed combination. *See, e.g., Iowa State University Broadcasting Corporation*, 9 F.C.C. Rcd 481 (1993)(permanent waiver); *Citadel Communications Co., Ltd.*, 5 F.C.C. Rcd 3842 (1990)(temporary waiver). Although some of the elements present in this case deviate in part from past waiver cases, given the bankrupt status of Debtor and its KSTS(TV), we find, for the reasons discussed below, that a temporary, twelve-month waiver of the duopoly rule is warranted.

12. Preliminarily, we note that the degree of overlap of the Grade B contours of the two television stations in this case exceeds that existing in most of our past duopoly waiver cases. Here, the predicted overlap area of the two stations, according to Telemundo's engineering exhibit, indicates that the overlap area of 7,007 square kilometers, inhabited by 1.8 million persons, represents 51 percent of the geographic area and 91.5 percent of the population within the Grade B contour of KSMS-TV and 50 percent of the geographic area and 31.3 percent of the population within the Grade B contour of KSTS(TV). However, as the Commission noted in *Family Television Corp.*, 59 R.R. 2d 1344, 1348 (1986), the size of the proposed overlap has been of "more critical concern" in cases involving requests for a permanent waiver of our rules and we are not constrained from granting a temporary waiver where circumstances "will not significantly frustrate the policies underlying the multiple ownership rules." Moreover, we have long been guided by the directive that we entertain waiver requests as a "safety valve procedure for consideration of an application for exemption based on special circumstances." *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). In this case, we believe that furtherance of the Plan and the vitalization of the Reorganized Telemundo would be compatible with the diversity and economic competition policies the duopoly rule is designed to promote. Thus, the magnitude of the temporary overlap in this case is not fatal to Debtor's waiver request, and our grant of that request provides the requisite "safety valve" under these "special circumstances" of a Debtor emerging from Chapter 11. *See Channel 64 Joint Venture, Debtor in Possession*, 3 F.C.C. Rcd 900 (1988), (one-year temporary waiver of duopoly granted to party holding a 5.7% to 12.1% attributable interest in one Cincinnati television station and proposing to hold an 8.5% to 12.6% attributable interest in another Cincinnati television station through a bankruptcy organization).

13. Specifically, we are cognizant of our obligation under the public interest mandate to consider the national policy underlying other federal laws, such as the bankruptcy laws pertinent here. *See LaRose v. FCC*, 494 F.2d 1145, 1146 n.2 (D.C. Cir. 1974). As the Commission has noted in a previous case, the objectives underlying the bankruptcy law are three-fold: equality of distribution among creditors, a fresh start for debtors, and the efficient and economical administration of cases. *Fox Television Stations, Inc.*, 8 F.C.C. Rcd 5341, 5343-44, *recon. denied*, 8 F.C.C. Rcd 8744 (1993), *appeal pending sub nom. Metropolitan Council of NAACP Branches v. FCC*, Case No. 93-1471 (D.C. Cir. July 26, 1993) (*citing Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc. No. 93-137, 93d Cong., 1st Sess., Pts. I and II, chapter 3 (1973)); *see also Channel 33, Inc.*, 4 F.C.C. Rcd 7674, 7680 (1988) (waiver of duopoly rule "premised largely on accommodating policies underlying the bankruptcy laws and the protection of innocent creditors . . ."). We believe that we can accommodate those bankruptcy policies here without countervailing harm to the policies supporting our own multiple ownership rules: by permitting implementation of the Plan so carefully crafted by the creditors; by permitting Debtor to emerge from bankruptcy with only half of its former debt and decreased interest rates on remaining debt; and by facilitating effectuation of the Plan by acting expeditiously in granting waiver of our rules.[5]

14. Equally important to our determination is the fact that grant of the temporary waiver request would promote the Commission's enduring goal of advancing diversity via increased minority ownership. *See, e.g., Notice of Proposed Rulemaking* in MM Docket No. 94-149 and 91-140, adopted December 15, 1994 (proposes to increase minority ownership); *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C. 2d 979 (1978)(established tax certificate and distress sale "policies); *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C. 2d 849 (1982), *proceeding terminated*, 99 F.C.C. 2d 1249 (1985) (clarified tax certificate policy and extended policy to cable). The Plan, which can be consummated only if we grant this temporary waiver, provides not only for ownership of approximately 16% of Telemundo by Bastion Capital, whose controlling principals and 20-percent equity owners are Guillermo Bron and Mr. Villanueva, both Hispanic Americans, but for management of the reorganized company by Joaquin Blaya, an Hispanic American slated to serve as Reorganized Telemundo's president and chief executive officer.

15. We also find that grant of a temporary waiver would not disserve the policies of diversity and economic competition which undergird our duopoly rule. As to the separateness of the markets served by the two television stations, we note that KSMS-TV, Monterey, is located in the Salinas-Monterey area of dominant influence ("ADI"),

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[4] An informal objection has been filed against that application.

[5] Here, the Plan, according to Debtor, must be consummated on or before December 31, 1994 in order to implement a litigation settlement agreement that is integral to the viability of the Plan. The settlement agreement will discharge a proof of claim filed with the bankruptcy court against Debtor for approximately $158 million in connection with a New York court action. *See* Plan at 1.

one of four full-service commercial television stations licensed to that market, the 103rd largest in the country. In contrast, KSTS(TV), San Jose, is located in the San Francisco-Oakland-San Jose ADI, the nation's fifth largest market, and is one of 17 full-service, commercial television stations licensed to that market.

16. With regard to the diversity of voices present in the temporary overlap area, Debtor's engineering exhibit indicates that there are 28 television stations providing Grade B service to all or part of the Grade B overlap area, yielding a multitude of voices, including three affiliates each of the four networks, ABC, CBS, NBC, and Fox, one Home Shopping Network affiliate, one Univision affiliate, eight independents, and six noncommercial stations.

17. Finally, Debtor contends that because the stations are not direct competitors, the proposed temporary overlap will not "diminish" the economic competition in the market. To assuage any concern that KSMS-TV and KSTS(TV), which are affiliates of rival Spanish-language networks, Univision and Telemundo, respectively, will not engage in robust competition, Mr. Villanueva has personally pledged to operate KSMS-TV "wholly independently" of the Debtor's KSTS(TV) by recusing himself "from any participation in the management or operation" of KSTS(TV). We shall rely on that representation as a means for maintaining the independence of the stations, the fifth factor in evaluating a waiver request. To that end, we specifically will require Mr. Villanueva to refrain from all discussions and involvement regarding the Telemundo network, as well as KSTS(TV), with any Bastion Capital or Telemundo officer, director, as well as any employee with access to information pertinent to those subjects, until the station is sold. In sum, we find that grant of a temporary, twelve-month, waiver of the duopoly rule, under the circumstances and based on the representations made herein, will inure to the public interest.

Analysis of the cross-interest policy

18. Apollo Advisors, L.P. ("Apollo Advisors") is the managing general partner of AIF II, L.P., one of two members of TLMD II, L.L.C ("TLMD"). Accordingly, TLMD's 15.5% stock interest in Reorganized Telemundo is deemed attributable to Apollo, as well as to Leon Black and John J. Hannan, proposed board members of Reorganized Telemundo who are also principals of the general partner of Apollo Advisors.[6] Through an investment fund it manages, Apollo Advisors has, via the holdings of Astrum International Corporation ("Astrum"), a 20 percent, nonvoting interest in Sandino Telecasters, Inc., the permittee of KZKI(TV), San Bernardino, California. That interest, according to the applicants, was acquired as "an incidental asset" of Astrum's predecessor corporation pursuant to a Chapter 11 reorganization resulting in a debt-to-equity conversion. While the nonvoting interest in the licensee of that station, currently operating pursuant to program test authority,[7] is not attributable to Apollo for purposes of the Commission's multiple ownership rules, that interest does implicate our cross-interest policy in that Apollo holds an attributable interest in Reorganized Telemundo's KVEA(TV), Corona. Both KZKI(TV) and KVEA(TV) are located in the Los Angeles ADI.

19. The cross-interest policy was developed to scrutinize relationships not proscribed by the multiple ownership rules but which nevertheless triggered Commission concerns for full competition and diversity of viewpoint. *See Minnesota Broadcasting Corp.*, 13 F.C.C. 672 (1949); *United Community Enterprises, Inc.*, 37 F.C.C. 2d 953 (Rev. Bd. 1972). Although the policy is currently the subject of a rulemaking proceeding, *Notice of Inquiry*, 2 F.C.C. Rcd 3699 (1987), *Further Notice of Inquiry/Notice of Proposed Rulemaking*, 4 F.C.C. Rcd 2035 (1989), *Further Notice of Proposed Rulemaking*, FCC 94-150, adopted December 15, 1994, until modified, we shall abide by our case-by-case approach for addressing cross-interest situations.

20. The applicants set forth several reasons, which collectively support our finding that Apollo's interest in KVEA(TV) and its concurrent potential influence over KZKI(TV), via its nonvoting interest, are unlikely to diminish arm's length competition or diversity, the governing concerns of the cross-interest policy. First, the level of Apollo's cross interests in KZKI(TV) and KVEA(TV) are consistent with that permitted by the Commission in past cases. *E.g., Cleveland Television Corp.*, 91 F.C.C. 2d 1129 (Rev. Bd.), *rev. denied*, FCC 83-235 (May 18, 1983), *aff'd sub nom. Cleveland Television Corp. v. FCC*, 732 F.2d 962 (D.C. Cir. 1984)(nearly sole ownership of the licensee of an AM/FM combination and a one-third nonattributable interest in the licensee of a television station in the same market); *Metromedia Broadcasting Corp.*, 1 F.C.C. Rcd 1022 (1986)(attributable 20% interest in the licensee of one television station and an nonattributable 17.39% voting interest in a single-majority-shareholder-owned licensee of another television station in the same market).

21. Second, the Los Angeles ADI, the nation's second largest, is a highly competitive broadcast market, sustaining 21 full-service television stations and 79 AM and FM radio stations, all owned by 80 separate "voices." Moreover, KZKI(TV), an independent English-language television station, and KVEA(TV), a Telemundo-affiliated Spanish-language television station, do not compete directly for viewers or advertisers in the Los Angeles market.

22. Third, it is represented that the two stations will continue to be operated separately "in all respects," including programming, sales and employment. Nor will Reorganized Telemundo or its Apollo-affiliated directors Black and Hannan, according to the applicants, have any "direct or indirect material involvement" in the management or operation of KZKI(TV).

23. Finally, the applicants note that a contract for sale of KZKI(TV) has been executed and an application for assignment of the permit soon will be filed with the Commission. In view of the foregoing, we conclude that the objectives supporting the cross-interest policy are not threatened by Apollo's interests in KZKI(TV) and KVEA(TV).

Exemption from attribution of Apollo principal

24. Marc Rowan is a vice president of Apollo Capital Management, Inc. ("Apollo Capital"), the general partner of Apollo Advisors, which serves as the managing general partner of AIF, one of the two members of TLMD, a

[6] Black is president and Hannan is vice president and director of Apollo Capital Management, Inc., the general partner of Apollo Advisors.

[7] An application seeking license to cover the construction permit for KZKI(TV) is pending before the Commission. FCC File No. BLCT-940124KF.

proposed 15.5 percent voting stockholder in Reorganized Telemundo. Rowan is also vice president of Lion Capital Management, Inc. ("Lion Capital"), an affiliate of Apollo Capital and the parent company of Lion Advisors, L.P. ("Lion Advisors"), which serves as the investment manager and attorney-in-fact of Artemis America, L.L.C. ("Artemis"), the other member of TLMD. Additionally, Rowan is a limited partner of Apollo Advisors and Lion Advisors. Despite the applicants' contention to the contrary, by virtue of these positional and ownership interests, Rowan is deemed to have an attributable interest, through TLMD, in Reorganized Telemundo. This interest conflicts with Rowan's seat on the board of directors of New World Communications Group, Incorporated ("New World"), the parent of the licensees of eleven television stations, one of which is KNSD(TV), San Diego.[8] Reorganized Telemundo will be the parent company of the licensees of seven television stations, one being KVEA(TV), Corona, whose Grade B contour overlaps with that of KNSD(TV). Rowan's dual positional interests, therefore, potentially violate the Commission's twelve-station rule, Section 73.3555(e), and the duopoly rule, Section 73.3555(b).

25. Reorganized Telemundo requests, pursuant to Note 2(h) of Section 73.3555, that Rowan be relieved of attribution of the Telemundo stations, thereby avoiding violations of the Commission's rules. To that end, the applicants indicate that Rowan's responsibilities at Apollo and Lion, whose investments range from furniture and luggage to footwear, apparel and supermarkets, as well as communications, relate to investment management. Accordingly, Rowan pledges to recuse himself "from any matters that may pertain, directly or indirectly, to Telemundo." Rowan also represents that he will have not, "and will have no ability to, exercise authority or influence over Telemundo, and will not participate in any discussion, policy-making role, or oversight function related in any manner to Telemundo or any of the stations licensed to it." Specifically, it is represented that Apollo Capital and Lion Capital will implement mechanisms to insure Rowan's recusal: matters involving Reorganized Telemundo will be discussed separately at all meetings, allowing ample opportunity for Rowan to refrain from participation; the financial reports for Apollo Capital and Lion Capital will be sufficiently aggregated so that Telemundo's performance figures are not separately displayed; reports containing any discrete information regarding Reorganized Telemundo will be redacted before distribution to Rowan; and all Apollo Capital and Lion Capital officers and directors, as well as any employee with access to Reorganized Telemundo will be informed at least quarterly of Rowan's recusal.

26. The Commission recently recognized director recusal from a multi-faceted corporation's television business as a predicate for relief from attribution. *Craig O. McCaw*, 9 F.C.C. Rcd 5836, 5915-16 (1994); *Viacom, Inc.*, 9 F.C.C. Rcd 1577, 1579 (1994). While we make no determination as to whether Apollo and Lion qualify as multi-faceted companies, we believe that their apparently singular business as investment companies can be divided into discrete investment activities. We find, therefore, that the diversified nature of Apollo's and Lion's investments lends itself to our granting "narrow" relief to Rowan, that is, not allowing disclaimer of his positional interests "as a matter of course." *Attribution of Ownership Interests*, 97 F.C.C. 2d 997, 1025 (1984). Further, the recusal procedures in place at Apollo Capital and Lion Capital insure that Rowan's recusal will be *bona fide*. *See Craig O. McCaw*, 9 F.C.C. Rcd at 5916. We caution Rowan that he must strictly observe his pledge to recuse himself completely from all Reorganized Telemundo matters, either those relating to the network or to the owned and operated television stations. We require that such recusal also applies to all Apollo and/or Lion investment activities that involve and/or implicate any of Reorganized Telemundo's businesses. Based on the applicants' representations and so long as these proscriptions are followed, we deem Rowan to hold a noncognizable interest in Reorganized Telemundo.

CONCLUSION

27. In conclusion, we find the applicants qualified to be licensees in all other respects. We have reviewed the applications and find that grant of the transfer of control of the licensees from Debtor to Reorganized Telemundo will serve the public interest, convenience and necessity.

28. Accordingly, IT IS ORDERED, that the applications for transfer of control of the licensees cited in the caption above, from Telemundo Group, Inc., Debtor in Possession to Telemundo Group, Inc., ARE GRANTED.

29. IT IS FURTHER ORDERED, that the request for permanent waiver of the one-to-a-market rule, Section 73.3555(c) of the Commission's rules, to permit common ownership by Daniel D. Villanueva of KCTQ(AM), Thousand Oaks, California, and KVEA(TV), Corona, California, IS GRANTED.

30. IT IS FURTHER ORDERED, that the request for temporary waiver of the television duopoly rule, Section 73.3555(b) of the Commission's rules, to permit common ownership by Daniel D. Villanueva of television stations KSMS-TV, Monterey, California, and KSTS(TV), San Jose, California, IS GRANTED, for a period not to exceed twelve months from the date of consummation of the instant transaction.

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[8] While Rowan personally is deemed to hold an attributable interest in New World, we do not find that interest attributable to Apollo or Lion or to any of its affiliates. We base this finding on the applicants' representation in their December 19, 1994 amendment that Rowan acceded to the board of New World by a vote of the so-called "Type 2" holders of New World common stock, which are entitled to select two New World directors. Those Type 2 holders are: Kodak Retirement Income Plan Trust Fund, Fidelity Capital & Income Fund, Fidelity Equity-Income Fund, Fidelity Magellan Fund, TCW Special Credits Funds II, IIb and IIIb, Weyerhaeuser Company Master Pension Trust, TCW Special Credits Trust, Inland Steel Industries Pension Trust, The Common Fund for Bond Investments, TCW Special Credits Trust IIIb, and the Delaware State Employees' Retirement Fund. Apollo is ineligible to vote, nominate or designate a director because it holds New World preferred stock and warrants, not common stock. Only if Apollo were to exercise its warrants would it be a Type 2 holder. Until Apollo converts its warrants, we shall not deem Rowan's directorate at New World to be attributable to Apollo.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

IDB Communications Group, Inc. and Southwest Communications, Inc. Transferors,	File Nos. 1798-DSE-AL-94(107) CSG-94-196(38)-AL CSG-94-197-AL ITC-94-453-TC SCL-94-005 ITC-94-454(AL)
and	9413412 EID-697

LDDS Communications, Inc. d/b/a LDDSMETROMEDIA, Transferee

and related transactions.

Application for authority pursuant to Sections 214 and 310(d) of the Communications Act of 1934, as amended, for authority to transfer control of cable landing licenses, and to transfer control and assign Title II authorizations and Title III licenses.

MEMORANDUM OPINION AND ORDER

Adopted: November 30, 1994; Released: December 15, 1994

By the Chief, International Bureau:

I. INTRODUCTION

1. On August 19, 1994, IDB Communications Group, Inc. ("IDB") and its subsidiaries and affiliates (jointly referred to as the "IDB Companies"), Southwest Communications, Inc. ("SCI"), LDDS Communications, Inc. d/b/a/ LDDSMETROMEDIA ("LDDS") and LDDS Corporation ("LDDS Corp.") (collectively the "Applicants"), pursuant to Sections 214 and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 214 and § 310(d), submitted the above-captioned application for transfers of control and assignments of Title II and Title III authorizations, and a request for expeditious processing. Applicants request the Commission's consent to: (1) transfer control of IDB Companies' Title II authorizations and cable landing licenses to LDDS;[1] (2) transfer and/or assign IDB Companies' Title III radio authorizations to LDDS Corp.;[2] (3) assign SCI's Title II authorizations to LDDS Corp.;[3] and (4) assign SCI's Title III radio authorizations to LDDS Corp.[4]

2. We also have before us, as a part of this application, a request for authority pursuant to Section 212 of the Communications Act, 47 U.S.C. § 212, and Section 62.1 of the Commission's Rules, 47 C.F. R. § 62.1, for interlocking directorates among IDB, IDB WorldCom Services, Inc., IDB WorldCom, Inc., IDB Mobile Communications, Inc. ("IDB Mobile"), CICI, Inc. ("CICI"), Satellite Transmission and Reception Specialists Company ("STARS"), IDB Communications Corporation, LDDS Corp., and LDDS.

3. On August 31, 1994, the application was placed on public notice. On September 30, 1994, COMSAT filed a Petition to Deny in Part ("Petition to Deny"). On October 13, 1994, the Applicants filed a Joint Opposition to the Petition to Deny in Part ("Joint Opposition"), and on October 26, 1994, COMSAT filed a Reply to the Joint Opposition ("COMSAT Reply"). We conclude that the proposed transactions will serve the public interest and that the application should be granted.

II. BACKGROUND

4. IDB directly or indirectly owns four subsidiaries that provide telecommunications services: (1) IDB Worldcom Services, Inc. d/b/a IDB WorldCom; (2) IDB Mobile; (3) CICI; and (4) STARS together with IDB d/b/a/ IDB Broadcast.[5] IDB WorldCom provides both U.S. domestic and international telecommunications services. p Domestically, IDB WorldCom provides message telephone service ("MTS") and private line service primarily on a resale basis. Internationally, it provides international message telephone service ("IMTS") to approximately 55 countries on either a resale or facilities basis; private line service to approximately 160 countries on a facilities basis; telex service to approximately 89 countries; and telegraph service.[6] IDB Mobile provides international mobile satellite services, including maritime mobile satellite service ("MMSS"), aeronautical mobile satellite service ("AMSS"), and land mobile satellite service ("LMSS"). IDB Mobile also holds an experimental radio license. IDB Mobile is 50% owned by IDB and 50% owned by Teleglobe International, Inc. of Canada ("Teleglobe"). CICI provides international private line services to government agencies and holds a Title III private earth station license. IDB Broadcast provides domestic and international video and audio distribution and transmission services on both a private carrier and common carriage basis.[7]

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[1] *See infra* Appendix A. Appendix A is the list of the IDB Companies' § 214 authorizations and cable landing licenses.

[2] *See infra* Appendix B. Appendix B is the list of the IDB Companies' Title III radio authorizations.

[3] *See infra* Appendix C. Appendix C is the list of SCI's Title II authorizations.

[4] *See infra* Appendix D. Appendix D is the list of SCI's Title III radio authorizations.

[5] *See* Letter from Rick Whitt, IDB Communications Group, Inc., to Susan O' Connell and Helene Schrier, FCC (Nov. 15, 1994) (*IDB Letter*). Currently, IDB Worldcom Inc. holds only an application for a private submarine fiber optic cable between Puerto Rico and the Dominican Republic (File No. SCL-94-001). *See Application for Transfer of Control of IDB Communications Group, Inc. to LDDS Communications, Inc. d/b/a LDDSMETROMEDIA and Related Transactions ("Application")*, Tab 7 (filed Aug. 19, 1994).

[6] The Applicants did not indicate the number of countries to which IDB provides telegraph service.

[7] *See IDB Letter*, at 1-3.

5. In 1992, the Commission authorized SCI, a Delaware corporation, to be the assignee of the Title III licenses of IDB Communications Corporation and CICI.[8] While IDB and CICI retain ownership of the underlying radio facilities, SCI holds the licenses to these Title III facilities and has a long-term (10 year) operator agreement with IDB and CICI under which SCI is to control, operate and maintain the systems. Neither IDB nor CICI has any ownership interest in SCI, nor does SCI have any ownership in IDB or CICI. SCI is owned by Jeffrey P. Sudikoff (49%), Peter Hartz (11%), and Edward R. Cheramy (40%).[9]

6. LDDS, a Georgia corporation, is the nation's fourth largest long-distance carrier.[10] Domestically, LDDS provides MTS and private line service on a resale and facilities basis, but operates primarily as a reseller. The International Bureau recently approved LDDS' proposed acquisition of WilTel, Inc., WilTel International, Inc., and WilTel Undersea Cable, Inc. (collectively, "WilTel").[11] WilTel operates an extensive fiber optic network within the United States.

7. Internationally, LDDS provides IMTS primarily as a reseller. It provides facilities-based IMTS to Canada only. It has received authority to provide facilities-based IMTS to many other countries.[12] LDDS has authority to provide switched and private line services via resold private lines between the United States and Canada[13] as well as to provide resold non-interconnected private line service to several countries.[14] LDDS controls or soon will control a number of companies engaged in similar business activities, such as LDDS Corp. and WilTel. LDDS Corp., a Delaware corporation, owns and operates common carrier point-to-point microwave stations, international and domestic earth stations, and other radio facilities for the purpose of providing facilities-based long distance telecommunications services.[15] WilTel provides resale of IMTS to most international locations and is authorized to provide facilities-based private line service between the United States and Canada and facilities-based switched and private line service between the United States and Cuba.[16] WilTel also is authorized to engage in non-interconnected private line resale to sixty-five countries.[17]

8. On August 1, 1994, LDDS and IDB entered into an Agreement and Plan of Merger ("Merger Agreement"), pursuant to which LDDS would acquire the IDB Companies, subject to Commission and other regulatory approvals.[18] Under the Merger Agreement, a new entity, 123 Corp., would be created as a wholly-owned Delaware subsidiary of LDDS for the purpose of implementing the merger. Upon closing of the transaction, 123 Corp. would merge with IDB and cease to exist. IDB, the surviving corporation in the merger, would continue its corporate existence as a wholly-owned subsidiary of LDDS.

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[8] *CICI, Inc. et. al., Memorandum Opinion, Order, Authorization and Certificate*, 7 FCC Rcd 6031 (Int. Fac. Div. 1992) (*CICI*).

[9] *Application* , Attachment C, Exhibit 2.

[10] Both Metromedia Company and ALLTEL Corporation hold more than 10% of LDDS' shares. ALLTEL provides local exchange services. Metromedia Company primarily manages portfolio companies in the hospitality, technology and auto parts businesses. John W. Kluge is the Chairman of the Board of LDDS Communications, Inc. and is a general partner of Metromedia Company. Stuart Subotnick, a director of LDDS Communications and the other general partner of Metromedia Company, holds a 50% ownership interest in Q Broadcasting, Inc., which owns radio stations WSTC(AM) and WQQQ(FM) in Stamford, Connecticut. *See Application*, Attachment A, Exhibit 2.

[11] *Application to Transfer Control of WilTel, Inc., and WilTel International, Inc. to LDDS Communications, Inc. d/b/a LDDSMETROMEDIA and related transactions, Memorandum Opinion and Order*, DA 94-1258 (Int. Bur. released Nov. 21, 1994).

[12] *LDDS Communications, Inc., Memorandum Opinion, Order and Authorization*, 8 FCC Rcd 5453 (Int. Fac. Div. 1993). *See also* Letter from Julie Barton, Hogan & Hartson, to Helene Schrier, FCC (Nov. 4, 1994) (*LDDS Letter*). LDDS recently obtained facilities-based authority to provide IMTS to Algeria, Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Morocco, Netherlands, Norway, Poland, Portugal, Slovakia, Spain, Sweden, Switzerland, Tunisia, and Turkey. *LDDS Communications, Inc. d/b/a/ LDDSMETROMEDIA, Order and Authorization*, 9 FCC Rcd 4896 (Int. Fac. Div. 1994); and to provide facilities-based IMTS and private line services between the United States and Cuba. *LDDS Communications, Inc., Memorandum Opinion, Order, Authorization & Certification*, DA 94-1098 (Int. Fac. Div. released Oct. 5, 1994). To date, LDDS does not provide service to these countries. *See LDDS Letter, supra*. WilTel, Inc. also has authority to provide facilities-based IMTS service to Cuba. *WilTel International, Inc., Memorandum Opinion, Order, Authorization & Certification*, 9 FCC Rcd 5806 (Int. Fac. Div. 1994).

[13] *LDDS Communications, Inc., Order and Certificate*, 9 FCC Rcd 1844 (Int. Fac. Div. 1994).

[14] *LDDS Communications, Inc., Order, Authorization and Certificate*, 9 FCC Rcd 1379 (Int. Fac. Div. 1994) (Brazil, Ireland, Singapore and the U.K.). Very few private lines are provided on any of these routes. *See LDDS Letter, supra* note 12.

[15] *Application*, Attachment B, Exhibit 2. Additionally, Applicants certify that they do not have an affiliation with a foreign carrier as defined in 47 C.F.R. § 63.01(r). *See generally, Application*.

[16] *See Application to Transfer Control of WilTel, Inc., and WilTel International, Inc. to LDDS Communications, Inc. d/b/a LDDSMETROMEDIA and related transactions*, at 2 and Attachment C, Exhibit 1 (filed Aug. 25, 1994); *WTG Central, Inc.* (WilTel, Inc.), *Order, Authorization and Certificate*, 6 FCC Rcd 2339 (Int. Fac. Div. 1991) (authorizing private line service between the United States and Canada); *WilTel International, Inc., Memorandum Opinion, Order, Authorization & Certification*, 9 FCC Rcd 5806 (Int. Fac. Div. 1994) (authorizing IMTS and other switched services, including facsimile, data and video transmission services, and international private line service by satellite between the United States and Cuba).

[17] *WilTel International, Inc., Order and Certification*, 9 FCC Rcd 1287 (Int. Fac. Div. 1994) (resale of international private line service to 48 countries); *WilTel International, Inc.*, File No. ITC-94-292, granted pursuant to Public Notice Report No. I-7019 (released Aug. 17, 1994) (authorizing resale of private line service to an additional 17 countries).

[18] *Application*, at 3-4 (description of transaction). The proposed sale of SCI's assets to LDDS Corp. is described at para. 9, *infra*. Pursuant to the Merger Agreement, holders of IDB shares would receive a minimum of .45867 LDDS share for each IDB share if LDDS shares are valued at $22 or more; or a maximum of .520231 LDDS share for each IDB share if LDDS shares are valued at $16 or less. The exchange ratio changes by .001445 LDDS share for every $.125 change in LDDS share value between $22 and $16. In addition, the $195 million in convertible subordinated notes issued by IDB would remain outstanding and the note holders would receive the corresponding exchange ratio adjustment to their common stock conversion price.

9. Upon closing of the transaction, control of all FCC Title II authorizations and cable landing licenses now held by the IDB Companies would be transferred to LDDS, and the FCC Title III radio licenses held by the IDB Companies would be assigned to LDDS Corp. In addition, control of a single business radio license held by IDB would be transferred to LDDS Corp. Pursuant to a separate agreement, LDDS Corp. would purchase SCI's assets. Upon closing of this transaction, the Title III radio licenses and the Title II authorizations held by SCI would be assigned to LDDS Corp.

10. The Applicants argue that grant of the application is in the public interest because it will bring together LDDS, one of the fastest-growing domestic interexchange carriers, with IDB, one of the fastest-growing international service providers. They state that the addition of IDB's predominantly international facilities-based services and other operations to LDDS' predominantly domestic operations would enable the combined entity to offer its customers a full range of competitively priced services, thereby increasing competition in both the domestic and international market sectors. The Applicants argue that such increased competition benefits consumers through improved service and lower rates.[19]

III. COMMENTS

11. In its Petition to Deny, COMSAT argues that the Inmarsat earth stations, which are among the Title III facilities licensed to SCI, are under the *de facto* control of IDB Mobile.[20] COMSAT further alleges that IDB Mobile, which is 50% owned by IDB and 50% owned by Teleglobe, a Canadian corporation, is under the *de facto* control of Teleglobe.[21] COMSAT asserts that this arrangement violates the foreign ownership limits set forth in Section 310(b) of the Communications Act. It therefore urges the Commission to deny the proposed Title III assignment application with respect to the Inmarsat earth stations unless the Applicants adopt definite, concrete and enforceable measures to ensure that these facilities will operate free of foreign control. Finally, COMSAT requests that the Commission consider, in the context of this proceeding, whether the public interest is served by continuing to license a foreign owned and controlled carrier to provide Inmarsat services in the United States, when U.S. carriers are barred from providing the same services in the foreign owner's home markets.[22]

12. As evidence that IDB Mobile controls SCI's earth stations, COMSAT says that (1) SCI is owned and managed by IDB owners and managers; (2) SCI's operating agreement with IDB and CICI (under which CICI retained ownership of the earth station facilities) does not provide sufficient net revenues, after contractually-defined lease and other expenses, to hire even a skeletal operations staff; (3) SCI operates the Inmarsat earth stations for the sole purpose of providing IDB Mobile's Inmarsat services; and (4) IDB Mobile manages and otherwise handles the development, installation, and debugging of certain digital switching software in IDB's earth stations, and IDB Mobile personnel control those earth station operations.[23]

13. As evidence that Teleglobe has not only negative *de jure* but also *de facto* control of IDB Mobile, COMSAT submits IDB's Form 10-Q, Quarterly Report under Section 13 or 15(d) of the Securities Exchange Act of 1934, for the quarter ended June 30, 1994. The Form 10-Q contains a note explaining IDB's decision to deconsolidate the results of operations of IDB Mobile. The note states that:

> The Company is currently evaluating its options with respect to its investment in IDB Mobile, including the possible sale of its 50% equity interest, because the Company no longer views IDB Mobile as part of its long-term strategy. As a result, the Company has significantly reduced its involvement in the management of IDB Mobile while, at the same time, its venture partner has substantially increased its participation in the operations of the venture. Therefore, the Company believes that it no longer exercises effective operating control over IDB Mobile which previously provided the basis for the consolidation of IDB Mobile's operating results.

According to COMSAT, this statement to the SEC demonstrates that IDB no longer exercises effective operating control over IDB Mobile and that Teleglobe is in *de facto* control of IDB Mobile.

14. Applicants respond first that COMSAT's arguments are irrelevant. They state that COMSAT has focused exclusively on IDB Mobile's relationship to SCI, instead of on LDDS, the transferee/assignee, which is the proper entity to evaluate in determining whether the grant of this application would serve the public interest.[24] Applicants assert that no party has alleged that the proposed transaction would not serve the public interest. They argue that it is IDB Mobile's increased competitive capabilities which really trouble COMSAT.[25] Second, Applicants contend that most of COMSAT's evidence that SCI does not control the earth stations licensed to it -- the fact that IDB principals own and manage SCI, and the operating agreement between IDB, CICI, and SCI -- was considered by the Commission in granting the applications authorizing the assignment of earth station licenses from CICI to SCI.[26] Moreover, the Applicants disagree with the significance COMSAT ascribes to IDB Mobile owning certain software in IDB Mobile switches co-located with some of SCI's earth stations. Applicants explain that the traffic routing software belongs to and is used by IDB Mobile as part of its overall network and such ownership and use raises no legal issues. Applicants assert that SCI's business is the transmission and reception of satellite traffic and, to that end, SCI controls radio transmission and reception at the earth stations. Applicants explain that SCI's customers, including IDB Mo-

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[19] *Id.* at 4-5.
[20] *Petition to Deny*, at 10-11.
[21] *Id.* at 7.
[22] *Id.* at 2.
[23] *Id.* at 11-13.
[24] *Joint Opposition*, at 2.
[25] *Id.* at 5-6.
[26] *CICI*, 7 FCC Rcd 6031 (Com. Car. Bur. 1992).

bile, gather or determine the destination of traffic transmitted and received through the earth stations SCI operates.[27]

15. Last, with respect to whether Teleglobe controls IDB Mobile, the Applicants explain that IDB Mobile has always been 50% owned by IDB and 50% owned by Teleglobe, giving each owner negative control. They assert that the question of whether or not IDB reports consolidated financial results with IDB Mobile is a matter of financial accounting practice that has nothing to do with the applications now before the Commission. At one time, the IDB Mobile Board of Directors specifically gave IDB responsibility for managing IDB Mobile's day-to-day operations.[28] According to the Applicants, that arrangement later was terminated, but control of IDB Mobile remained the same: IDB at all times retained its legal, negative control over IDB Mobile.[29]

16. COMSAT replies that the issue of control of the earth stations is directly relevant to this proceeding. COMSAT cites: (i) Section 310(d) of the Communications Act, which requires that the Commission review applications for transfer of control or assignments of Title III licenses as if the transferees or assignees are applying for the original licenses;[30] and (ii) Section 309(e), which directs the Commission to designate applications for hearing if "a substantial and material question of fact is presented" regarding whether grant of the application would serve the public interest, convenience, and necessity.[31] Also, COMSAT cites Section 310(b) of the Act, which gives the Commission continuing authority and responsibility to ensure that no radio license "shall be granted to *or held by*" entities with foreign ownership or control in excess of the statutory limits.[32] COMSAT states that the Applicants acknowledge that IDB Mobile is 50% owned by Teleglobe. Additionally, it suggests that the Applicants did not directly refute that Teleglobe has substantially increased its participation in the operations of IDB Mobile while IDB "no longer exercises effective operating control."[33] And, COMSAT asserts that, other than questioning whether IDB Mobile's ownership and control of software used in each earth station's network control processor is evidence that IDB Mobile controls the Title III facilities, the Applicants did not rebut other evidence that IDB Mobile, and indirectly Teleglobe, controls SCI's earth stations. Consequently, COMSAT contends, this arrangement violates the Commission's statutory foreign ownership limits. On the basis of these facts, COMSAT argues that, at a minimum, a hearing is warranted on who controls SCI's Inmarsat facilities."[34]

IV. DISCUSSION

17. COMSAT argues that the Inmarsat earth stations, which are among the Title III facilities licensed to SCI, are under the *de facto* control of Teleglobe, a foreign carrier, in contravention of Section 310(b) of the Communications Act. In support of this conclusion, COMSAT alleges that: (1) IDB Mobile has assumed *de facto* control of these earth stations facilities; and (2) Teleglobe has assumed *de facto* control of IDB Mobile. COMSAT requests a hearing on who controls the Inmarsat earth stations licensed to SCI. COMSAT also asks the Commission to deny the instant application with respect to the Inmarsat earth station licenses unless the Applicants adopt definite, concrete and enforceable measures to ensure that the facilities will operate free of foreign control. More generally, COMSAT urges the Commission to consider, in the context of this proceeding, whether the public interest is served by continuing to license IDB Mobile to provide Inmarsat services in the United States when U.S. carriers are barred from providing such services in Teleglobe's home market.

18. We address first COMSAT's request for a hearing on who controls the Inmarsat earth stations licensed to SCI. Parties challenging an application by means of a petition to deny and who seek a hearing on the basis of the petition must satisfy a two-pronged test. *See* 47 U.S.C. § 309(d)(1) & (2).[35] Under Section 309(d)(1), the protesting party must submit a petition containing specific allegations of fact sufficient to show that a grant of the application would be prima facie inconsistent with the public interest, convenience, and necessity.[36] In conducting its inquiry, the Commission proceeds on the assumption that the specific facts set forth in the petition are true.[37] If the Commission determines that the petitioner has satisfied this threshold standard for a petition to deny, the Commission must then determine, pursuant to Section 309(d)(2), whether a substantial and material question of fact has been presented. In this later determination, the Commission considers the entire record.[38] Should the Commission conclude that such a question of fact has been raised, the Commission is required to designate the application for hearing.[39]

19. Applying this two-pronged analysis here, we do not find that a hearing on control of the Inmarsat earth stations is warranted by the present record. We need not decide whether COMSAT has satisfied the first prong of our test -- *i.e.*, that an unauthorized transfer of control of the Inmarsat earth stations from SCI to Teleglobe (through IDB Mobile) would render grant of the subject application prima facie inconsistent with the public interest, convenience, and necessity. W e need not reach this issue because we find that COMSAT has not satisfied the second

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27 *Joint Opposition*, at 5.
28 *Id.* at 4.
29 *Id.*
30 47 U.S.C. § 310(d); *COMSAT Reply*, at 2.
31 47 U.S.C. § 309(e); *COMSAT Reply*, at 2.
32 47 U.S.C. § 310(b); *COMSAT Reply*, at 2-3.
33 *COMSAT Reply*, at 5-6.
34 *Id.* at 7.
35 *See Astroline Communications Co. Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline*).
36 *Id.* (citing 47 U.S.C. § 309(d)(1)). Under this part of the test, the Commission is limited to considering the petition and its supporting affidavits.
37 *See Astroline*, 857 F.2d at 1561 (citing *Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 397 (D.C. Cir. 1985)).
38 Under this part of the test, the Commission considers the application, the pleadings filed, and other matters which it may officially notice. *See id.*
39 *See* 47 U.S.C. § 309(e). *See also Astroline*, 857 F.2d at 1561.

prong of the test.[40] COMSAT has not presented a substantial and material question of fact as to whether SCI controls the Inmarsat earth stations licensed to it.

20. In *CICI*, the Chief of the International Facilities Division of the Common Carrier Bureau ("Division") reviewed and approved: (1) the ownership and management of SCI by certain principals of IDB; (2) the fact that SCI does not own the earth station facilities licensed to it; and (3) the operating arrangement between SCI and CICI. COMSAT has presented no new information about the ownership or management of SCI or the earth station facilities licensed to it. Therefore, we see no reason to disturb the Division's conclusion that these two factors do not result in a transfer of control of the Inmarsat earth stations to IDB Mobile. Similarly, the financial terms of the operating agreement on which COMSAT relies are the same as those that were before the Division in *CICI*. Even if we assume that there is insufficient net revenue from the operating agreement to hire operational personnel, which is far from clear, COMSAT overlooks the fact that SCI may be generating revenue from other sources or operating at a loss. Thus, we do not agree with COMSAT that the terms of the operating agreement raise the inference that SCI is not in control of these Inmarsat earth stations.

21. In addition, we do not find the fact that IDB Mobile may be SCI's sole customer for its Inmarsat earth stations to be probative on the control issue. Under the arrangement approved in *CICI*, the Division noted that SCI had the option of soliciting alternative business opportunities. Last, we do not find IDB Mobile's control of switching software for the Inmarsat earth stations to be probative of IDB Mobile's control of those earth stations. The record supports the Applicants' explanation that the traffic routing software is an integral part of IDB Mobile's provision of service, as distinguished from the provision of radio transmission and reception at the earth stations. Therefore, IDB Mobile may properly purchase and maintain such software, subject to the ultimate control of SCI to take any necessary steps to control for potential interference that may be caused by such software. In sum, we find that COMSAT has not raised a substantial and material question of fact as to control of the Inmarsat earth stations licensed to SCI. We therefore deny its request for a hearing on that issue.

22. Because we find that COMSAT has failed to raise a substantial and material question of fact about whether IDB Mobile controls SCI's earth stations, we necessarily reject COMSAT's suggestion that *Teleglobe* controls those earth stations *through* IDB Mobile in violation of Section 310(b). For the same reason, we find it unnecessary to require that LDDS Corp. submit further information to the Commission regarding its plans for control of the Inmarsat earth stations. No evidence suggests that LDDS Corp. would not observe its statutory obligation to maintain control of its Title III licenses upon closing. Therefore, we deny COMSAT's request that we deny the instant application unless the Applicants adopt definite, concrete and enforceable measures to ensure that the Inmarsat earth stations will operate free of foreign control.

23. Although, as we have noted, the insufficiency of COMSAT's allegations about SCI's earth stations removes any issue under Section 310(b) of the Act, we address on our own motion, under the public interest standard of Section 214 of the Act, COMSAT's allegation of an unauthorized transfer of *de facto* control of IDB Mobile to Teleglobe, which owns 50% and has negative *de jure* control of that entity. Even if we assume COMSAT's allegation to be true -- that there has been an unauthorized transfer of *de facto* control of IDB Mobile to Teleglobe[41] -- we find this allegation insufficient to demonstrate that grant of this application would be prima facie inconsistent with the public interest, convenience and necessity. The Commission has found that the appropriate sanction for this type of violation is a fine and not a revocation of license.[42] After the transaction is completed, IDB Mobile, Teleglobe and IDB will still be subject to our jurisdiction and forfeiture power. Accordingly, we do not believe that the public interest would be served by holding up the proposed acquisition of IDB by LDDS even if there has been an unauthorized transfer of control of IDB Mobile.[43] Moreover, even if we were inclined to revisit the policy basis for granting IDB Mobile's initial Section 214 authorization, as COMSAT appears to request, we would not undertake such a broad reconsideration in the context of this adjudicatory proceeding. Therefore, we deny COMSAT's Petition to Deny.

24. We intend to investigate, however, independent of this proceeding, the question of whether there has been an unauthorized transfer of control of IDB Mobile. The SEC filing submitted by COMSAT states that "[IDB] believes that it no longer exercises effective operating control over IDB Mobile, which previously provided the basis for consolidation of IDB Mobile's operating results." We do not find IDB's explanations for this statement entirely convincing. We recognize that the SEC statement may not accurately reflect the degree of control exercised by Teleglobe or IDB, and we therefore do not find that the SEC statement is sufficient to demonstrate that an unauthorized transfer of control has occurred. We will, however, investigate further under our statutory enforcement authority.

25. Sections 214(a) and 310(d) of the Act require that we find that the public interest, convenience, and necessity will be served by the transfer of control and assignment of

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[40] *See Centel Corporation, Sprint Corp., and F W Sub Inc., Memorandum Opinion and Order*, 8 FCC Rcd 1829 (Com. Car. Bur. 1993).

[41] *See, e.g., Barnes Enterprises, Inc., Memorandum Opinion and Order*, 55 FCC 2d 721 (1975) (relinquishing negative control requires prior Commission approval); *Albert J. Feyl, Memorandum Opinion and Order*, 15 FCC 823, 825-26 (1951) (acquiring negative control requires Commission approval).

[42] *See Silver Star Communications-Albany, Inc., Memorandum Opinion and Order*, 6 FCC Rcd 6905 (1991) (stating that unauthorized transfer of control does not necessarily warrant revocation unless it is concealed through misrepresentation or other deception); *Action Page, Inc., Notice of Apparent Liability*, 9 FCC Rcd 1821 (Mob. Serv. Div. 1994) (imposing fine for transferring negative control without Commission approval); *Telecourier Communications Corporation, Notice of Apparent Liability*, 9 FCC Rcd 1736 (Mob. Serv. Div. 1994) (imposing fine for transferring a noncontrolling 50% interest without Commission consent).

[43] *See KSBW License, Inc., Memorandum Opinion and Order*, FCC 94-239 (Nov. 4, 1994) (approving broadcast license renewal but issuing Notice of Apparent Liability for violation of Commission EEO rules); *Crescomm Transmission Services, Inc. and Holmdel Telecommunications Group, Inc., Memorandum Opinion and Order*, 9 FCC Rcd 5313 (Int. Fac. Div. 1994) (approving an assignment of authorizations and referring to Bureau Enforcement Division an admitted premature transfer of control of such authorizations).

Section 214 certificates and Title III radio licenses. Subsumed in the public interest standard is a requirement that we review, as appropriate, the citizenship, character, financial, technical and other qualifications of the transferee applicant.[44] Based on the evidence in the record, we conclude that LDDS, an existing interstate and international communications carrier, satisfies the Commission's threshold qualification requirements and has the financial wherewithal and technical expertise to provide service consistent with the public interest.[45]

26. In addition to considering whether the applicant meets the threshold requirements under Sections 214(a) and 310(d) of the Act, we consider under these statutory provisions the proposed transaction's effects on competition. We note that the Commission also is authorized to enforce Section 7 of the Clayton Act with respect to mergers involving common carriers such as LDDS and IDB.[46] The courts have construed these statutory authorizations to mean that the Commission has discharged its responsibilities "when the Commission seriously considers the antitrust consequences of a proposal and weighs those consequences with other public interest factors."[47]

27. Based on the record before us, we find it unlikely that the proposed merger will have anticompetitive effects in any relevant market.[48] Both Applicants provide service in the domestic interexchange service market.[49] According to the Applicants, IDB operates as both a resale and facilities-based carrier.[50] IDB has less than 1.5% of the domestic interexchange market.[51] LDDS provides interexchange service, primarily on a resale basis, and is about to acquire WilTel, which operates an extensive fiber optic network. Regular reports to the Commission indicate that LDDS, after acquiring WilTel, will have 3% of the domestic interexchange market.[52] Thus, it appears that the proposed additional merger with IDB will result in a merged entity with a domestic interexchange market share of less than 5%.

28. We also consider whether the proposed merger might have anticompetitive effects in the international markets -- specifically, the IMTS and "non-IMTS" telecommunications service markets.[53] In these product markets, geographic markets are generally defined on a route-by-route basis.[54] Both LDDS and WilTel offer IMTS primarily on a resale basis, while IDB provides IMTS on both a resale and facilities basis.[55] Both IDB and LDDS, the latter through WilTel, provide non-IMTS service. IDB7 has significant non-IMTS facilities.[56] Regular reports to the Commission indicate that in the IMTS market the proposed merger will result in a merged entity with a market share, on all routes combined, of approximately 2.1%.[57] In the non-IMTS market, regular reports to the Commission indicate that, while IDB is the third largest competitor with a market share of

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[44] 47 U.S.C. §§ 308(b) and 310(d). *See e.g., Contel Corp., Memorandum Opinion and Order*, 6 FCC Rcd 1003 (1991).

[45] *See generally, Application.*

[46] *See* Section 702(d) of the Communications Act, 47 U.S.C. § 602(d); 15 U.S.C. § 21(a). Section 7 of the Clayton Act, 15 U.S.C. § 18, proscribes the acquisition of the stock or assets of a company by another company "where in any line of commerce in any section of the country" the effect of such acquisition may be "substantially to lessen competition, or to tend to create a monopoly."

[47] *United States v. FCC*, 652 F.2d 72, 88 (D.C. Cir. 1980) (*en banc*). We have discretion whether to enforce Section 7 of the Clayton Act. *Id.* at 83. We exercise our discretion not to invoke our Clayton Act jurisdiction in this proceeding because our authority under the Communications Act suffices to achieve a result consistent with the public interest standard and its competitive component.

[48] The relevant "product market" is the line of commerce within which there is interchangeability of use between a service or product and a reasonable substitute for it, given considerations of price, use, and quality. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324-25 (1962); *United States v. FCC*, 652 F.2d 72, 97 (D.C. Cir. 1980). The relevant "geographic market" is the area in which buyers can practically turn for alternative sources of supply, or in which there are sellers who act to restrain the prices charged to those buyers. *United States v. Philadelphia National Bank*, 374 U.S. 321, 359 (1963).

[49] The Commission has found that interexchange services in the United States constitute a relevant market. *Craig O. McCaw, Memorandum Opinion and Order*, ¶ ¶ 11-12 (released Sept. 9, 1994), FCC No. 94-238, File No. ENF 93-44, *appeal pending on other grounds* sub nom. *Southwestern Bell Corp. v. FCC*, D.C. Cir. No. 94-1637; *Common Carrier Services*, 95 FCC 2d 554, 562-63 (1983), *rev'd on other grounds sub nom. AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992).

[50] IDB estimates that, of its total domestic switched voice revenues, approximately 30% is attributable to facilities-based services and approximately 70% is attributable to pure resold services. It estimates that, of its total domestic private line revenues, the amount attributable to pure resold service is negligible. *See* Letter from IDB, Rick Whitt, to Susan O'Connell and Helene Schrier, FCC (Nov. 16, 1994) ("IDB Clarification Letter").

[51] *See IDB Letter*, at 2. According to the IDB Letter, IDB has 1.5% of the MTS market and less than 1% of the private line market. Combining both figures and dividing by the total toll service market (MTS and non-MTS) yields a total of less than 1.5%.

[52] Because we maintain data only for total toll service, which includes both domestic and international toll service, we have subtracted international toll service from total toll service to determine the domestic toll market shares. *See Long Distance Market Shares, Second Quarter, 1994*, Industry Analysis Division, Common Carrier Bureau, at Table 5 (Sept. 1994); *1993 Section 43.61 International Telecommunications Data*, Industry Analysis Division, Common Carrier Bureau, at Figure 7 and Table D1 (Nov. 1994).

[53] The Commission has defined two primary international markets, IMTS and non-IMTS. The non-IMTS market consists of such services as private line, telex, and telegraph. *OTI Corp.*, 6 FCC Rcd 1611, 1612 (1991), and *General Electric Co.*, 3 FCC Rcd 2803, 2804, n.10 (1988), *review denied* , 4 FCC Rcd 8207 (1989), *both following International Competitive Carrier Policies*, 102 FCC 2d 812, 823-28 (1985), *reconsideration denied*, 60 Rad. Reg. 2d (P & F) 1435, FCC 86-339 (1986).

[54] *OTI Corp.*, 6 FCC Rcd at 1612; *International Competitive Carrier Policies*, 102 FCC 2d at 828-29 (1985).

[55] *See* IDB Clarification Letter. *See also 1993 Section 43.61 International Telecommunications Data*, Industry Analysis Division, Common Carrier Bureau, at Figure 7 and Table D1 (Nov. 1994).

[56] *See 1993 Section 43.61 International Telecommunications Data*, Industry Analysis Division, Common Carrier Bureau, at Figure 7 (Nov. 1994).

[57] *See 1993 Section 43.61 International Telecommunications Data*, Industry Analysis Division, Common Carrier Bureau, at Figure 7 and Table D1 (Nov. 1994). All the market share statistics in this competitive analysis reflect the proposed transfer of control of Wiltel, Inc. and Wiltel International, Inc. to LDDS Communications, Inc., which the International Bureau authorized by Memorandum Opinion and Order, DA 94-1258 (released Nov. 21, 1994).

21.4%, LDDS (through WilTel) is an insignificant one, with a market share of approximately one fifth of one percent.[58] The merger of IDB and LDDS would result in only a minuscule increase in the market share of the combined entity in the non-IMTS market. It does not appear that the merged entity would have a significantly higher market share on any individual route in either the IMTS or non-IMTS market.

29. The Applicants' prospective domestic interexchange, IMTS and non-IMTS market shares indicate that the proposed merger will not increase concentration to a significant degree in any relevant market and, therefore, will not reduce competition.[59] Such results do not raise competitive concerns, absent a showing of special circumstances. No such showing has been made here. Nor do we see any reason to believe that the combination of any of these businesses under LDDS' control will enable it to leverage its strength in one market to cause anticompetitive effects in another. Moreover, we note the following additional factors, which are present in each relevant market, that lead us to conclude there will be no anticompetitive effects from the proposed merger: (1) no customer or competitor of either applicant has protested the merger on grounds of alleged anticompetitive effects; (2) neither applicant has monopoly power; and (3) the merged entity will face direct competition from many large, well-capitalized, experienced facilities-based carriers and resellers.

30. Finally, we see no potential anticompetitive effects by authorizing interlocking directorates for several IDB and LDDS companies.[60] Because the companies will be commonly owned after the proposed merger, we find that grant of the Applicants' request to have interlocking directorates would serve the public interest by permitting efficient management, coordination, and shared experience in the competitive telecommunications marketplace without adversely affecting public or private interests.

31. Based on the foregoing considerations, we conclude that the proposed transfer will not result in any anticompetitive effects under our public interest analysis.[61] On the contrary, we anticipate that the proposed transaction will create procompetitive benefits by producing a combined entity with improved capability of serving customers in several markets.

V. CONCLUSION

32. In conclusion, the proposed transfer appears to raise no competitive concerns under our public interest analysis. We also find that LDDS is legally, technically, financially and otherwise qualified to operate and provide service via IDB's and SCI's telecommunications facilities and that the proposed transaction would, in fact, offer some procompetitive public interest benefits. Consequently, we find that grant of the instant application for consent to transfer of control and assignment of licenses will serve the public interest, convenience and necessity.

VI. ORDERING CLAUSES

33. Accordingly, IT IS ORDERED, pursuant to Sections 214 and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 214, 310(d) and Section 63.01 of the Commission's Rules, 47 C.F.R. § 63.01, that the application of IDB Communications Group, Inc. and its subsidiaries and affiliates, Southwest Communications, Inc., LDDS Communications, Inc. and LDDS Corporation, IS GRANTED and Applicants are authorized to: (1) transfer control of IDB Companies' Title II authorizations and cable landing licenses to LDDS, File Nos. ITC-94-453(TC) and SCL-94-005; (2) assign Southwest Communications, Inc.'s Title II authorizations to LDDS Corporation, File No. ITC-94-454(AL); (3) transfer and/or assign IDB Companies Title III radio authorizations to LDDS Corp., File No. CSG-94-197-AL; and (4) assign SCI's Title III radio authorizations to LDDS Corp., File Nos. 1798-DSE-AL-94(107), CSG-94-196(38)-AL, and 9413404. However, this consent is without prejudice to any further action the Commission might take with respect to any violation of Section 214 of the Communications Act by IDB, Teleglobe or IDB Mobile.

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[58] *See 1993 Section 43.61 International Telecommunications Data*, Industry Analysis Division, Common Carrier Bureau, at Figure 7 (Nov. 1994). IDB reports its television transmission revenues in the "miscellaneous" category of Figure 7. Neither LDDS nor WilTel report any miscellaneous revenues. We have included miscellaneous revenues in our calculation of the non-IMTS market shares.

[59] An accepted benchmark for measuring the competitive effects of a merger of two firms in the same market is the Herfindahl-Hirschman Index ("HHI"). The HHI yields numerical estimates of the amount of concentration in a market before and after a merger. Specifically, it squares the market share of each party before the merger, and sums them; then it squares the market share of the merged entity; and it compares the two numbers. The HHI thus focuses on the increase in concentration caused by the merger. See 1992 Department of Justice - Federal Trade Commission Horizontal Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,104 at 20,570, 20,573-5 to -6 (1992) ("Guidelines"). The greatest HHI increase in any of the three markets involved in this proposed merger will be in the domestic interexchangeh): market. There, LDDS' 3% market share will combine with IDB's 1.5% market share, causing an increase of 9 in the HHI. According to the Guidelines, even in a highly concentrated market, "[m]ergers producing an increase in the HHI of less than fifty points . . . . are unlikely to have adverse competitive consequences and ordinarily require no further competitive analysis." Guidelines at 20,573-6.

[60] Section 212 of the Act prohibits persons from holding the position of, or nominating, an officer or director of more than one carrier unless authorized by the Commission upon a showing that neither public nor private interests will be adversely affected by the interlock. In determining whether the public or private interests will be adversely affected, the Bureau considers a number of different factors, including but not limited to the potential for anticompetitive conduct, a possible diminution in the independence of each carrier involved, and the possibility of conflicts of interest on the part of common directors or officers in violation of the fiduciary duties imposed on persons occupying these positions. *See In re Application of James A. Dwyer,* 2 FCC Rcd 4278 (Com. Car. Bur. 1987) (citing *In re Application of Walter Gifford,* 2 FCC 741 (1935)).

[61] *See* Letter from Victor Cohen, Premerger Notification Office, Bureau of Competition, to Mr. Cannada, Chief Financial Officer, LDDS Communications, Inc. (Sept. 7, 1994). We note that the United States Department of Justice has reviewed the proposed merger and has not objected to it or otherwise questioned its lawfulness.

34. IT IS FURTHER ORDERED that COMSAT's Petition to Deny in Part is DENIED.

35. IT IS FURTHER ORDERED that LDDS Corp. will assume all terms and conditions associated with the assigned Title II authorizations and Title III licenses.

36. This order is issued under Section 0.261 of the Commission's Rules, 47 C.F.R. § 0.261, and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. §§ 1.106, 1.115, may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2), 47 C.F.R. § 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

Appendix A

IDB COMMUNICATIONS GROUP, INC.

TITLE II AUTHORIZATIONS

Rev. 8/10/94

IDB COMMUNICATIONS GROUP, INC.
TITLE II AUTHORIZATIONS

	SERVICE	FILE NO.	GRANT DATE
1.	Intelsat: SCPC Audio	I-T-C-88-048	9/1/88
2.	Transborder to Mexico, the Caribbean, Central America and South America	I-T-C-87-051	3/10/87
3.	Transborder to Canada	2805-DSE-MP/L-85	2/6/86
4.	Intersputnik: Occasional Use Video and Program Audio via Statsionar 4 and Statsionar 11	I-T-C-89-100	2/12/92

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IDB WORLDCOM SERVICES, INC.

TITLE II AUTHORIZATIONS
(Including Pending Applications)

Rev. 8/9/94

IDB WORLDCOM SERVICES, INC.

TITLE II AUTHORIZATIONS ASSIGNED FROM
IDB COMMUNICATIONS GROUP, INC.*/

	SERVICE	FILE NO.	GRANT DATE
1.	Intersputnik: Non-Switched Private Line	I-T-C-90-188	5/29/91
2.	Soviet Statsionar 26: International TV and Non-Switched Private Line (155° W.L.)	I-T-C-91-195	4/7/92
3.	Soviet Statsionar 10: International TV and Private Line (170° W.L.)	I-T-C-92-163	10/8/92
4.	Soviet Statsionar 11: International TV and Private Line (11° W.L.)	I-T-C-92-178	11/23/92
5.	Soviet Statsionar 11: PSNS (11° W.L.)	STA (TAO-2338)	Exp: 5/29/94
6.	Intersputnik Statsionar 4 PSNS (14° W.L.)	I-T-C-91-049	4/16/93
7.	Intelsat: PSNS to Many Countries	I-T-C-93-024	3/11/93
8.	International Resale of IMTS	I-T-C-93-019	3/18/93
9.	Intelsat: IBS and International TV	I-T-C-87-103	12/19/86
10.	Columbia/TDRSS: International Communications Services	I-T-C-93-017	3/8/93
11.	PanAmSat: International TV, Video, Digital Data, Voice and SCPC Audio	I-T-C-89-091	11/13/89

PENDING

1.	Soviet Statsionar 11: PSNS (11° W.L.)	I-T-C-91-196	Filed: 8/20/91
2.	Soviet Statsionar 10: PSNS (170° W.L.)	I-T-C-92-164	Filed: 5/7/92

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*/ Pursuant to Pro Forma Assignment of Licenses Authorized in File No. ITC-94-296-AL, granted June 14, 1994.

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Rev. 8/9/94

IDB WORLDCOM SERVICES, INC.

TITLE II AUTHORIZATIONS ASSIGNED
FROM CICI, INC.*/

	SERVICE	FILE NO.	GRANT DATE
1.	INTELNET	I-T-C-85-193	9/30/85
2.	Multipurpose service (PSN) via INTELSAT to U.S.S.R. and Guyana	I-T-C-81-020	5/13/91
3.	AMSS and MMSS via INMARSAT	I-T-C-91-113	9/24/91
4.	Ownership Interest in APC Cable System	I-T-C-92-092	9/30/92
5.	Ownership Interest in (IRU) in UK-GER5 Cable System	I-T-C-92-192	10/15/92
6.	Ownership Interest in DK-GER1 and DK-RUSS1 Cable Systems (Extend TAT-10)	I-T-C-93-072	4/27/93
7.	TAT-9 to Israel	I-T-C-93-226	9/15/93
8.	APC to Singapore; Japan Tie Cable	I-T-C-93-232	9/15/93
		PENDING	
1.	Statsionar 11 Non-Switched Private Line Service to Many Countries	I-T-C-93-075	Filed: 1/11/93

*/ Pursuant to Pro Forma Assignment of Licenses Authorized in File No. ITC-94-296-AL, granted June 14, 1994.

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Rev. 8/9/94

IDB WORLDCOM SERVICES, INC.

CABLE LANDING LICENSES ASSIGNED FROM WORLD COMMUNICATIONS, INC.*/

Atlantic Region

Facility	File Number	Citations
TAT-5/MAT-1 1/	S-C-L-40	13 FCC 2d 263 (1968)
TAT-6 2/	S-C-L-45-3	34 FCC 2d 132 (1972)
TAT-7 3/	S-C-L-51	FCC 79-596 (10/5/79)
	S-C-L-51-A	
TAT-8	S-C-L-84-001	FCC 84-241 (6/13/84)
TAT-9	S-C-L-88-004	3 FCC Rcd 7304 (1988)
TAT-10	S-C-L-91-001	7 FCC Rcd 130 (1992)
TAT-11	S-C-L-91-002	7 FCC Rcd 134 (1992)
TAT-12/TAT-13	S-C-L-93-004	DA 93-822 (7/7/93)

Pacific Region

Facility	File Number	Citations
HAW-3 4/	S-C-L-44-3	41 FCC 2d 343 (1973)
HAW-4	S-C-L-85-003	Mimeo 16686 (12/27/85)
HAW-5	S-C-L-90-004	5 FCC Rcd 7393 (1990)
TransPacific-2 5/	S-C-L-46-1	41 FCC 2d 451 (1973)
TransPacific-3	S-C-L-85-003	Mimeo 1686 (12/27/85)
TransPacific-4	S-C-L-89-004	4 FCC Rcd 8040 (1989)
Guam-Philippines-Taiwan	S-C-L-88-003	3 FCC Rcd 5089 (1988)

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*/ Pursuant to Pro Forma Assignment of Licenses Authorized in File No. ITC-94-296-AL, granted June 14, 1994.

1/ I-T-D-92-005 (Deactivated and retired)
DA 92-1750
December 23, 1992

2/ I-T-D-94-008 (retired)
DA-94-659
June 15, 1994

3/ I-T-D-94-009 (retired)
DA94-659
June 15, 1994

4/ I-T-D-93-004 (Deactivated and retired)
DA 93-401
March 31, 1993

5/ Scheduled to be retired.

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Caribbean Region

Facility	File Number	Citations
Florida-St. Thomas-2	S-C-L-386/	5 FCC 2d 823 (1966)
Florida-St. Thomas-3	S-C-L-53	89 FCC 2d 378 (1982)
St. Thomas-Brazil	S-C-L-47	68 FCC 2d 1000 (1978)
St. Thomas-Venezuela-2	S-C-L-47	68 FCC 2d 1000 (1978)
TransCaribbean System	S-C-L-87-001 S-C-L-88-001	3 FCC Rcd 5877 (1988)
TAINO-CARIB	S-C-L-92-002	DA 92-861 (6/25/92)
Columbus II	S-C-L-93-001	DA 93-908 (7/26/93)
Americas I	S-C-L-93-002	DA 93-909 (7/26/93)

6/ I-T-D-92-002 (Deactivated and retired)
DA 92-1142
August 18, 1992

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IDB WORLDCOM SERVICES, INC.

SECTION 214 CABLE AUTHORIZATIONS ASSIGNED FROM WORLD COMMUNICATIONS, INC.*/

Atlantic Region

Facility	File Number	Citations
TAT-5/MAT-1	P-C-7022	13 FCC 2d 235 (1968)
TAT-6	T-C-2452	35 FCC 2d 801 (1972)
TAT-7	I-T-C-2765	73 FCC 2d 248 (1978)
TAT-8	I-T-C-84-072	98 FCC 2d 440 (1984)
TAT-9	I-T-C-88-181	4 FCC Rcd 1129 (1988)
TAT-10	I-T-C-91-135	FCC 91-417 (1/13/92)
TAT-11	I-T-C-91-136	7 FCC Rcd 136 (1992)
PTAT-1	I-T-C-89-134	4 FCC Rcd 6622 (1989)
	I-T-C-90-013	5 FCC Rcd 61 (1990)
	I-T-C-91-007	6 FCC Rcd 2870 (1991)
CANTAT-11	T-C-2451	35 FCC 2d 801 (1972)
TAT-12/TAT-13	I-T-C-93-062	DA 93-823 (7/7/93)

Pacific Region

Facility	File Number	Citations
HAW-3	T-C-2441	43 FCC 2d 505 (1973)
	T-C-2441-A	app. for retirement (12/10/92)
HAW-4	I-T-C-85-219	American Telephone & Telegraph Co., et al. released 1/7/86
HAW-5	I-T-C-90-081	5 FCC Rcd 7344 (1990)
ANZCAN	CC Docket No. 81-343	47 Fed. Reg. 57040 (12/22/82)
TransPacific-3	I-T-C-85-219	1986 FCC, Lexis 4178 (1/7/86)
TransPacific-4	I-T-C-89-086	4 FCC Rcd 8042 (1989)
Guam-Philippines-Taiwan	I-T-C-88-094	3 FCC Rcd 5091 (1988)
Hong Kong-Japan-Korea	I-T-C-89-009	4 FCC Rcd 562 (1989)
North Pacific Cable	I-T-C-91-007	6 FCC Rcd 2870 (1991)
PacRimEast	I-T-C-90-072	5 FCC Rcd 7331 (1990)
PacRimWest	I-T-C-90-097	5 FCC Rcd 7362 (1990)
TASMAN-2	I-T-C-91-095	6 FCC Rcd 2958 (1991)

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*/ Pursuant to Pro Forma Assignment of Licenses Authorized in File No. ITC-94-296-AL, granted June 14, 1994.

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Caribbean Region

Facility	File Number	Citations
Florida-St. Thomas-2	P-C-6290	5 FCC 2d 823 (1966)
	P-C-6290-A-1/4	-
Florida-St. Thomas-3	I-P-C-81-050	88 FCC 2d 1630 (1982)
St. Thomas-Brazil	I-P-C-5	67 FCC 2d 451 (1978)
	I-P-C-5-A	
St. Thomas-Venezuela-2	I-P-C-5	67 FCC 2d 451 (1978)
	I-P-C-5A	
TransCaribbean System	I-T-C-88-071	3 FCC Rcd 6073 (1988)
	I-T-C-91-065	6 FCC Rcd 2206 (1991)
	I-T-C-91-125	6 FCC Rcd 4650 (1991)
TAINO-CARIB	I-T-C-92-106	DA 92-862 (6/25/92)
Columbus II	I-T-C-93-029	DA 93-910 (7/28/93)
Americas I	I-T-C-93-030	DA 93-911 (7/28/93)

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Rev. 8/9/94

IDB WORLDCOM SERVICES, INC.

SECTION 214 SERVICE AND FACILITIES AUTHORIZATIONS
ASSIGNED FROM WORLD COMMUNICATIONS, INC.*/

Service/Facilities	File Number	Citations
All Section 214 Authorizations of Western Union, and its predecessor ITT World Communications, Inc.1/	ENF-88-18	4 FCC Rcd 2219 (1989)
Authorization to Provide International Voice/Data Services as a Facilities Based Carrier	I-T-C-90-128 I-T-C-91-003	5 FCC Rcd 5634 (1990) 5 FCC Rcd 7459 (1990)
Authorization to Provide International Switched Voice Services as a Resale Carrier	I-T-C-90-039	5 FCC Rcd 2101 (1990)
PSNS via Intersputnik (Statsionar 4)	I-T-C-91-203	DA 93-438 (4/16/93)

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*/ Pursuant to Pro Forma Assignment of Licenses Authorized in File No. ITC-94-296-AL, granted June 14, 1994.

1/ The FCC authorized WorldCom to acquire from Western Union all Section 214 authorizations in a general sense which had been issued to Western Union and to its predecessor, ITT. Western Union was unable to list each specific authorization with its FCC file number because the records of the ITT authorizations were lost. In another proceeding the Commission also recognized and accepted Western Union's inability to list specific authorizations: "WUC states that the records of the ITT WorldCom authorizations were lost and recreation of a list of those authorizations from the Commission's files would be extremely difficult. Therefore, WUC requests a waiver of the requirement to provide Section 214 file numbers for those former ITT WorldCom authorizations. We grant this WUC request." Western Union, File No. I-T-D-90-011, DA 90-1874 (December 28, 1990). To the extent a similar waiver is appropriate in the instant application, applicants respectfully request such a waiver to ensure that all authorizations remain intact. Applicants will prepare and file with the FCC a list of these authorizations known to Applicants.

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Rev. 8/9/94

IDB WORLDCOM SERVICES, INC.

SECTION 214 AUTHORIZATIONS ASSIGNED FROM
SATELLITE TRANSMISSION AND RECEPTION SPECIALIST COMPANY*/

Service/Facilities	File Number	Citations
Authorization to Operate as an International Resale Carrier	I-T-C-90-151	5 FCC Rcd 6680 (1990)
Authorization to Establish Channels of Communication Between the Houston International Teleport and Points in Canada	I-T-C-87-146	2 FCC Rcd 7185 (1987)
Authorization to Establish Channels of Communication Between the Houston International Teleport and Points in Mexico	I-T-C-86-054	Mimeo No. 5220 June 20, 1986

*/ Pursuant to Pro Forma Assignment of Licenses Authorized in File No. ITC-94-296-AL, granted June 14, 1994.

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IDB WORLDCOM SERVICES, INC.

SECTION 214 AUTHORIZATIONS
ASSIGNED FROM TRT/FTC INTERNATIONAL, INC.*/

1. Section 214 Authorizations (The File Number shown is that of the underlying basic direct operating certificate. Various authorizations for supplemental cable and satellite facilities have been obtained for many of the overseas countries listed.)

OVERSEAS COUNTRIES	FILE NUMBER OF BASIC CERTIFICATE
All countries	I-T-C-88-082
Argentina	I-T-C-88-066
Australia	I-T-C-89-168
Bolivia	I-T-C-91-150
Chile	I-T-C-89-120
Colombia	I-T-C-88-169
Costa Rica	I-T-C-90-020
Denmark	I-T-C-89-149
Egypt	I-T-C-88-201
Ecuador	I-T-C-92-071
France	I-T-C-88-019
Germany	I-T-C-88-046
Guatemala	I-T-C-90-091
Honduras	I-T-C-90-020
Hong Kong	I-T-C-88-173
Japan	I-T-C-91-179
Mexico	I-T-C-90-180
Netherlands	I-T-C-88-104
Nicaragua	I-T-C-91-013
Peru	I-T-C-89-041
Portugal	I-T-C-86-162
Singapore	I-T-C-90-023
South Korea	I-T-C-90-054
Switzerland	I-T-C-90-077
United Kingdom	I-T-C-85-117
Venezuela	I-T-C-88-065

2. Granted Authorizations

a. Canada -- Landline facilities and switched voice services.
Filed June 8, 1990 -- Appeared on Public Notice July 11, 1990.
File No. I-T-C-90-144. Granted: March 31, 1993.

b Uruguay -- Satellite facilities for common carrier and switched voice services.
Filed October 22, 1992 -- Appeared on Public Notice November 4, 1992.
File No. I-T-C-93-015. Granted: February 16, 1993.

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*/ Pursuant to Pro Forma Assignment of Licenses Authorized in File No. ITC-94-296-AL, granted June 14, 1994.

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IDB WORLDCOM SERVICES, INC.*/

TITLE II AUTHORIZATIONS

A. Submarine Cable Landing Licenses

FILE NO.	DESCRIPTION
S-C-L-47	BRUS and VENEZUELA II Cable System
S-C-L-51	TAT-7 Cable System
S-C-L-51A	TAT-7 Cable System
S-C-L-53	Florida-St. Thomas III Cable System
S-C-L-84-001	TAT-8 Cable System
S-C-L-85-003	HAW-4/TPC-3 and GP-2 Cable System
S-C-L-88-003	G-P-T Cable System
S-C-L-88-004	TAT-9 Cable System
S-C-L-89-004	TPC-4 Cable System
S-C-L-90-003	PacRimEast Cable System
S-C-L-90-004	HAW-5 Cable System
S-C-L-90-005	PacRimWest Cable System
S-C-L-91-001	TAT-10 Cable System
S-C-L-91-002	TAT-11 Cable System
S-C-L-92-002	Tainocarib Cable
S-C-L-92-005	TPC-5 Cable System
S-C-L-93-001	Application for Columbus II Cable System. Granted: 7/13/93
S-C-L-93-002	Application for Americas-1 Cable System. Granted: 7/13/93
S-C-L-93-004	Application for TAT-12/TAT-13 Cable Network. Granted: 7/7/93

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*/ TRT/FTC Communications, Inc. changed its name to IDB WorldCom Services, Inc.

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B. Section 214 Authorizations. (The File Number shown is that of the underlying basic direct operating certificate. Various authorizations for supplemental cable and satellite facilities have been obtained for many of the overseas countries listed.)

OVERSEAS COUNTRIES	FILE NUMBER OF BASIC CERTIFICATE
North America	
Canada	I-T-C-82-259
Mexico	T-C-2307
Europe	
Austria	I-T-C-2335-6
Belgium	T-C-2462-17
Cyprus	I-T-C-85-084
Denmark	I-T-C-81-144
Finland	I-T-C-81-145
France	I-T-C-2972
France (PTAT-1)	I-T-C-90-135
W. Germany	I-T-C-2335-4
Greece	I-T-C-81-173
Hungary	I-T-C-83-169
Iceland	I-T-C-2645
Italy	T-C-2335-1-A
Irish Republic	I-T-C-81-345
Luxembourg	I-T-C-80-031
Kenya	I-T-C-89-133
Netherlands	T-C-2462-27
Norway	I-T-C-81-146
Poland	I-T-C-89-133
Portugal	I-T-C-2462-37
Spain	I-T-C-2335-7
Sweden	I-T-C-2971
Switzerland	I-T-C-2462-9
Turkey	I-T-C-89-133
United Kingdom	T-C-2335-3
United Kingdom (PTAT-1)	I-T-C-90-069
U.S.S.R.	I-T-C-88-209
U.S.S.R. (TAT-6)	I-T-C-91-087
U.S.S.R. (Intersputnik)	I-T-C-91-019
Mid-East Asia	
Bahrain	I-T-C-83-031
India	I-T-C-82-049
Bangladesh	I-T-C-90-092
Iraq	I-T-C-2462-16
Israel	I-T-C-88-185

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OVERSEAS COUNTRIES	FILE NUMBER OF BASIC CERTIFICATE
Jordan	I-T-C-83-050
Kuwait	I-T-C-2462-24
Oman	I-T-C-84-092
Pakistan	I-T-C-82-249
Saudi Arabia	I-T-C-2462-40
Sri Lanka	I-T-C-84-042
United Arab Emirates	I-T-C-81-119
Africa	
Algeria	I-T-C-88-203
Egypt	I-T-C-81-121
Ethiopia	I-T-C-2831
Ivory Coast	I-T-C-81-148
Liberia	I-T-C-84-093
Nigeria	I-T-C-88-108
Senegal	I-T-C-86-131
South Africa	I-T-C-86-064
Zambia	I-T-C-83-082
Far East	
Australia	I-T-C-2588-2
Fiji	I-T-C-81-275
Hong Kong	I-T-C-2688
Indonesia	I-T-C-83-032
Japan	I-T-C-83-032
Japan (TPC-4)	I-T-C-89-086
Japan (NPC)	I-T-C-91-051 (Pending)
Korea	I-T-C-86-064
Malaysia	I-T-C-83-032
New Zealand	I-T-C-82-240
Papua-New Guinea	I-T-C-2958
Philippines	I-T-C-2588
Singapore	I-T-C-2787
Taiwan	I-T-C-82-070
Thailand	I-T-C-82-277
Latin America & Caribbean	
Argentina	I-T-C-2462-10
Ascension Islands	I-T-C-2462-14
Bahamas	T-C-1470-1
Barbados	I-T-C-82-146
Belize	I-T-C-2462-42
Bermuda	I-T-C-3038
Bermuda (PTAT-1)	I-T-C-92-018
Bolivia	I-T-C-2462-34
Brazil	T-C-2262
Cayman Islands	I-T-C-3011
Chile	I-T-C-2462-29
Colombia	T-C-2462-1

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OVERSEAS COUNTRIES	FILE NUMBER OF BASIC CERTIFICATE
Costa Rica	T-C-2642-5
Cuba	C4-83-003-R
Dominican Republic	I-T-C-2732
Ecuador	T-C-2430-2
El Salvador	I-T-C-82-042
Guatemala	T-C-2388
Guyana	I-T-C-2462-48
Haiti	I-T-C-89-167
Honduras	T-C-2459
Jamaica	T-C-1967
Netherlands Antilles	I-T-C-81-209
Nicaragua	T-C-2446
Panama	T-C-1947
Paraguay	T-C-2462-44
Peru	I-T-C-2462-33
Puerto Rico	T-C-2497
Trinidad/Tobago	I-T-C-2462-26
Uruguay	I-T-C-2790
U.S. Virgin Islands	I-T-C-2668
Venezuela	T-C-2341-1
Pacific Rim	
Hawaii	I-T-C-90-081

PTAT-1 AUTHORIZATIONS

1. PTAT-1/Authorized common carrier service between the U.S. and the United Kingdom. File No. I-T-C-90-069/June 20, 1990. (One E-1)

2. PTAT-1/Authorized common carrier service between U.S. and the United Kingdom. File No. I-T-C-90-108/November 13, 1990. (One DS-2)

3. PTAT-1/Authorized common carrier service between the U.S. on the one hand, and the United Kingdom and Germany on the other hand, and beyond. File No. I-T-C-90-179/December 20, 1990. (Three E-1s for the U.K. and one E-1 for Germany)

4. PTAT-1/Authorized common carrier service between the U.S. and France. File No. I-T-C-90-135/January 7, 1991. (One E-1)

5. PTAT-1/Authorized common carrier service between the U.S. and Bermuda. File No. I-T-C-92-018. (One DS-1)

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IDB WORLDCOM SERVICES, INC.*/

SUBMARINE CABLE LANDING LICENSES AND
SECTION 214 AUTHORIZATIONS OF TRT/FTC COMMUNICATIONS, INC.
ORIGINALLY GRANTED TO FTC COMMUNICATIONS, INC.

A. Submarine Cable Landing Licenses

FCC File Number	Adoption Date	Facility	Destination
S-C-L-51 & 51A	9/27/79	TAT-7**/	Europe
S-C-L-84-001	5/24/84	TAT-8	Europe
S-C-L-85-003	12/27/85	HAW-4/TPC-3 & GP-2	Pacific
S-C-L-88-004	12/15/88	TAT-9	Europe
S-C-L-89-004	10/26/89	TPC-4	Canada & Japan
S-C-L-88-003	--	G-P-T	Pacific

B. Section 214 Authorizations

T-C-1358	6/15/60	TAT-2	France
T-C-1684	3/15/63	TAT-1	U.K.
T-C-1745	7/22/64	TAT-3	France
T-C-1818	8/15/64	CANTAT-1	U.K.
T-C-1745-1	7/9/65	TAT-2 TAT-3	Europe Europe
T-C-2112	5/27/68	TAT-3	U.K.
T-C-2174	6/7/78	--	France
T-C-2194	6/23/69	TAT-4	France
T-C-2336-3	1/18/74	TAT-5	France
T-C-2356-2	1/18/74	Satellite	France
I-T-C-2112-2	6/24/74	TAT-1	U.K.
I-T-C-2336-4	7/1/74	Satellite	U.K.

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*/ TRT/FTC Communications, Inc. changed its name to IDB WorldCom Services, Inc.

**/ I-T-D-94-009 (Deactivated and retired)
DA94-659
June 15, 1994

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I-T-C-2336-5	2/13/75	Satellite	U.K.
I-T-C-2336-5-A	2/13/75	Satellite	U.K.
I-T-C-2336-6	2/13/75	Satellite	U.K.
I-T-C-2336-13	12/5/79	TAT-4	Switzerland
I-T-C-2826	12/5/79	Landline	Cameroon
I-T-C-2878	1/11/80	Satellite	---
I-T-C-2914	3/3/80	TAGIDE	France
I-T-C-2692	4/17/80	Satellite	Senegal
I-T-C-2826	4/29/80	Landline	---
I-T-C-2992	6/2/80	TAT-4, TAT-5	Switzerland
I-T-C-2954 (73 FCC 2d 325, 375-300		TAT-4, TAT-5 TAT-6, TAT-7 Satellite	U.K., France Germany, Italy, Spain
I-T-C-3114	8/29/80	TAT-5	Portugal
I-T-C-3067	9/9/80	Satellite	French Guiana
I-T-C-3073	7/22/80	Landline	---
I-T-C-3207	11/12/80	Satellite	U.K.
I-T-C-81-127	3/10/81	TAT-5	Portugal
I-T-C-81-091	3/13/81	Satellite	Italy
I-T-C-2638	10/10/76	TAT-6	France
I-T-C-2649	11/15/76	TAT-6	U.K.
I-T-C-2649-1	2/4/77	TAT-6	---
I-T-C-2649-3	10/7/77	TAT-6	France, U.K.
I-T-C-2336-14	2/13/78	Satellite	France
I-T-C-2690	8/1/78	---	Costa Rica
I-T-C-2700	10/16/78	---	---
I-T-C-2764 (73 FCC 2d 248)	8/1/79	TAT-7	France, Switzerland, U.K.
I-T-C-2649-2	9/11/79	Satellite	France, U.K.
I-T-C-2649-4	9/11/79	TAT-6	France, U.K.
I-T-C-2336-7	2/21/75	Satellite	France
I-T-C-2336-10	3/19/75	---	---

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I-T-C-2336-9	4/8/75	Satellite	France
I-T-C-2336-12	10/6/75	Satellite	U.K.
T-C-2358	7/2/71	Landline	Ft. Lauderdale
T-C-2336	7/22/71	Satellite	France
T-C-2356	2/11/72	TAT-5	France
T-C-2356	6/21/72	TAT-5	France
T-C-2356-1	7/10/72	TAT-5	France
T-C-2356	9/27/72	TAT-5	France
T-C-1745-1-M	2/7/73	TAT-3	U.K.
T-C-2336-2	2/28/73	Satellite	Ivory Coast
I-T-C-2336-8	5/20/76	Satellite	U.K.
I-T-C-81-026 I-T-C-81-095	3/18/81	TAT-6	Germany
I-T-C-81-046	3/26/81	TAT-6 CANTAT-2	U.K.
I-T-C-81-120	4/23/81	TAT-6	France
I-T-C-81-207	4/27/81	TAT-6	Germany
I-T-C-81-184	5/20/81	TAT-6	Austria
I-T-C-81-172	6/3/81	Landline	Domestic
I-T-C-81-276	6/22/81	TAT-6	France
I-T-C-81-264	7/27/81	TAT-6	France
I-T-C-81-292	9/4/81	Satellite	U.K.
I-T-C-81-244	9/24/81	---	Domestic
I-T-C-81-334	10/15/81	Landline	Canada
I-T-C-82-002	11/19/81	Satellite	Sweden
I-T-C-82-003	11/19/81	Satellite	Ireland
I-T-C-82-035	11/24/81	Satellite	Cameroon
I-T-C-82-009	12/2/81	Satellite	Australia
I-T-C-82-017	12/2/81	TAT-6	Netherlands
I-T-C-82-044	12/4/81	Satellite	Cameroon
I-T-C-82-028	12/9/81	Satellite	Panama
I-T-C-81-313	12/17/81	---	Domestic

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I-T-C-82-052	12/30/81	Landline	Norway
I-T-C-3211	12/30/81	Satellite/ Cable	Worldwide
I-T-C-82-029	1/11/82	Satellite	Europe
I-T-C-81-022	1/19/82	Landline	Domestic
I-T-C-82-094	4/9/82	TAT-6	France
I-T-C-82-059	1/22/82	Satellite	Singapore
I-T-C-82-084	2/12/82	Satellite	Hong Kong
I-T-C-82-112	3/8/82	Satellite	Niger
I-T-C-82-135	3/19/82	Satellite	Germany
I-T-C-82-134	3/19/82	Satellite	Senegal
I-T-C-82-153	4/16/82	TAT-6	Austria
I-T-C-82-174	5/3/82	TAT-6	Ireland
I-T-C-82-154	5/11/82	Satellite	Belgium
I-T-C-82-212	6/28/82	TAT-6	Austria
I-T-C-82-242	8/18/82	TAT-6	France
I-T-C-82-230	8/20/82	Satellite	Philippines
I-T-C-82-266	9/14/82	TAT-6	France
I-T-C-82-263	10/4/82	Satellite	Gabon
I-T-C-82-291	9/24/82	CANTAT-2	Ireland
I-T-C-83-011	12/16/82	Satellite	U.K.
I-T-C-82-087	12/8/82	Satellite	U.K.
I-T-C-83-044	1/24/83	Satellite	Saudi Arabia
I-T-C-83-030	1/20/83	Landline	Denmark
I-T-C-83-059	2/7/83	TAT-6	France
I-T-C-83-061	2/7/83	TAT-6	Austria
I-T-C-83-098	4/19/83	TAT-6	France
I-T-C-83-080	3/23/83	TAT-6	France
I-T-C-83-071	3/11/83	TAT-6	France
I-T-C-83-076	4/11/83	Satellite	Argentina
I-T-C-83-104	5/30/83	Landline	Canada
I-T-C-83-018-M	5/27/83	TAT-6	France

I-T-C-83-107	5/9/83	Satellite	France
I-T-C-83-108	5/9/83	Satellite	U.K.
I-T-C-83-119	6/13/83	Canber	Bermuda
I-T-C-83-122	6/13/83	Satellite	France
I-T-C-83-141	7/29/83	Anzcan North	Australia
I-T-C-83-141	7/29/83	Anzcan South	Australia
I-T-C-83-157	8/5/83	Satellite	Costa Rica
I-T-C-83-167	7/28/83	TAT-6 & Marpal	Italy
I-T-C-83-170	8/22/83	Satellite	Tunisia
I-T-C-83-183	9/28/83	CANTAT-2	---
I-T-C-83-182	9/26/83	Satellite	Venezuela, Spain, Greece, Finland, Bahrain, Morocco, Algeria, India, Pakistan, Japan, Korea, Taiwan
I-T-C-83-197	10/5/83	Satellite	Costa Rica
I-T-C-83-196	10/5/83	Satellite	Bermuda
I-T-C-84-010	11/3/83	Satellite	Australia
I-T-C-84-003	10/20/83	Landline	New Orleans
I-T-C-84-205	10/15/84	TAT-7	Belgium
I-T-C-85-003	10/22/84	Satellite	Costa Rica
I-T-C-85-002	11/26/84	Landline	Mexico
I-T-C-85-006	12/4/84	Satellite	Guatemala
I-T-C-85-059	2/11/85	Satellite	New Zealand
I-T-C-85-058	2/11/85	Satellite	Syria
I-T-C-85-075	3/11/85	Satellite	Thailand
I-T-C-85-074	2/15/85	Satellite	Indonesia
I-T-C-85-078	3/14/85	Satellite	All IBS Points
I-T-C-85-121	4/9/85	Satellite	Thailand
I-T-C-85-122	4/9/85	Satellite	Austria
I-T-C-85-118	5/3/85	Satellite Satellite Satellite Satellite	Chile Ethiopia Kenya Iraq

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I-T-C-85-148	5/22/85	TAT-7	Germany
I-T-C-85-180	7/10/85	TAT-7	France
I-T-C-85-179	7/10/85	Satellite	Denmark
I-T-C-85-207	8/9/85	Satellite	Japan
I-T-C-85-214	2/5/86	Satellite	Trinidad and Tobago
I-T-C-84-018	11/1/83	Satellite	Finland
I-T-C-84-005	1/31/84	---	France
I-T-C-84-056	5/23/84	TAT-7	U.K.
I-T-C-84-075	2/23/84	Satellite	Sweden
WPC 4805	12/19/83	Domestic	Domestic
I-T-C-84-080	3/26/84	Satellite	Cayman Islands
I-T-C-84-072	6/8/84	TAT-8	Europe
I-T-C-84-087	3/19/84	Satellite	Bahrain
I-T-C-84-113	4/16/84	Satellite	Portugal
I-T-C-84-114	5/7/84	Satellite	Barbados
TAO-1009	4/2/84	Satellite	Egypt
I-T-C-84-120	5/22/84	Satellite	Egypt
I-T-C-84-133	6/7/84	Satellite	Singapore
I-T-C-84-166	9/4/84	Satellite	Indonesia
I-T-C-84-180	11/21/84	Satellite	Atlantic Basin
I-T-C-85-219	12/31/85	HAW-4	Australia
I-T-C-85-219	1/7/87	TRANSPAC-4	Japan
I-T-C-86-007	11/5/85	TAT-7	France
I-T-C-86-036	12/18/85	TAT-6	France
I-T-C-86-041	12/30/85	TAT-6	France
I-T-C-86-128	8/27/86	Satellite	Republic of China (Taiwan), Korea, Pakistan, India, Algeria, Morocco, Spain, Greece
I-T-C-86-112	9/19/86	HAW-4/TPC-3	Pacific Basin
I-T-C-87-012	12/12/86	Satellite	Japan
I-T-C-87-018	12/12/86	Satellite	Bermuda

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I-T-C-87-020	12/12/86	Satellite	Philippines
I-T-C-87-019	12/12/86	Satellite	Sweden
I-T-C-87-021	12/12/86	Satellite	Hong Kong
I-T-C-87-045	1/27/87	Satellite	Angola
I-T-C-87-076	3/20/87	Satellite	Argentina
I-T-C-87-075	9/30/87	Satellite Cable-TAT-6 TAT-7	France
	6/26/87	Satellite	Angola, Kenya
I-T-C-88-014	12/29/87	TPC-3 HAW-4	Japan
I-T-C-88-018	11/18/87	TAT-7 Satellite	U.K.
I-T-C-88-040	3/25/88	Satellite	Malaysia
I-T-C-88-058	2/26/88	Satellite	W. Germany
I-T-C-88-003	8/23/84	HAW-4/TPC-3 GP-2	
I-T-C-88-127	1/26/89	Resale	Canada
I-T-C-88-151	1/19/89	Resale	All countries except Canada
I-T-C-88-181	12/15/88	TAT-9	U.K., France Spain
I-T-C-87-138	6/26/87	Satellite	Angola, Kenya
I-T-C-89-104	8/22/89	PTAT-1	U.K.
I-T-C-89-086	10/26/89	TPC-4	Canada & Japan
I-T-C-90-019	6/1/90	PTAT-1 (Supplemental)	U.K.
I-T-C-90-033	6/1/90	PTAT-1 (Supplemental)	U.K.
I-T-C-91-135	12/19/91	TAT-10	Germany, Netherlands
I-T-C-91-136	12/19/91	TAT-11	U.K., France
I-T-C-91-207	11/26/91	Trans-Caribbean Cable	Colombia
I-T-C-92-106	6/25/92	Taino-Carib Cable	Puerto Rico, St. Thomas and British V.I.
I-T-C-92-179	11/12/92	TPC-5	Hawaii, Guam and Japan

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C. <u>Granted Authorizations</u>

1. U.S.S.R. - Use of Intersputnik Satellite System for IMTS. File No. I-T-C-91-057. Granted: 4/16/93.

2. Columbus II Cable System. Authorized services between U.S. Mainland, Mexico, U.S. Virgin Islands, Spain, Italy and Portugal. File No. I-T-C-93-029. Granted: 7/13/93.

3. Americas-1 Cable System. Authorized services between U.S. Mainland, U.S. Virgin Islands, Brazil, Trinidad and Venezuela. File No. I-T-C-93-030. Granted: 7/13/93.

4. TAT-12/TAT-13 Cable System. Authorized services between U.S. Mainland, Unite Kingdom and France. File No. I-T-C-93-062. Granted: 7/7/93.

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IDB WORLDCOM SERVICES, INC.
TITLE II AUTHORIZATIONS

1. Cuba: Direct Telex Service Between the United States and Cuba
   File No. ITC-94-211
   Granted: April 22, 1994

2. PANAMSAT: Switched Voice Service Between the United States and Panama and the United States and the Dominican Republic
   File No. ITC-94-287
   Granted: June 29, 1994

PENDING

3. Statsionar 4: Between the United States and Various Foreign Countries for Private Line, International TV and Program Audio Services
   File No. ITC-94-259
   Filed: April 6, 1994

4. Statsionar 4: Switched Voice Service Between the United States and Various Foreign Countries
   File No. ITC-94-306
   Filed: May 6, 1994

5. Statsionar 4 or INTELSAT: Switched Voice Service Between the United States and Cuba
   File No. ITC-94-260
   Filed: April 6, 1994

6. CANTAT-3/DK-RUSSIA 1 Cable Systems
   File No. ITC-94-_____
   Filed: August 5, 1994

7. Cuba: Direct Packet Switched Data Service
   File No. ITC-94-_____
   Filed: August 10, 1994

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CICI, INC.

TITLE II AUTHORIZATIONS AND CABLE LANDING LICENSES

Rev. 8/10/94

CICI, INC.

TITLE II AUTHORIZATIONS
AND CABLE LANDING LICENSES

	SERVICE	FILE NO.	GRANT DATE
1.	IBS	I-T-C-85-158	9/12/85
2.	Ownership interest in TAT-9	I-T-C-88-181	12/15/88
3.	IRU and/or lease interest in PTAT-1	I-T-C-89-103	8/22/89
4.	TAT-9 (Cable Landing License)	SCL-88-004	12/15/88
5.	Soviet Statsionar 11 Non-Switched Private Line	I-T-C-91-123	6/28/91
6.	INTELSAT Private Line Service to Many Countries	I-T-C-91-112	6/28/91
7.	INTELSAT Public Switched Service to Many Countries	I-T-C-91-114	6/28/91
8.	Ownership Interest in NPC Cable System	I-T-C-91-149	8/12/91
9.	Ownership Interest in TPC-4 Cable System	I-T-C-91-163	9/30/91
10.	TPC-4 (Cable Landing License)	S-C-L-91-005-ML	9/30/91
11.	Ownership Interest in TAT-10	I-T-C-91-135	12/19/91
12.	TAT-10 (Cable Landing License)	S-C-L-91-001	12/19/91
13.	Ownership Interest in TAT-11	I-T-C-91-136	12/19/91
14.	TAT-11 (Cable Landing License)	S-C-L-91-002	12/19/91

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	SERVICE	FILE NO.	GRANT DATE
15.	TPC-5 (Cable Landing License)	S-C-L-92-005	11/12/92
16.	Ownership Interest in TPC-5 Cable System	I-T-C-92-179	11/12/92
17.	Ownership Interest in TAT-12/TAT-13	I-T-C-93-062	7/7/93
18.	TAT-12/TAT-13 (Cable Landing License)	S-C-L-93-004	7/7/93
19.	International TV	I-T-C-87-079	9/30/87

PENDING

1.	NPC (Cable Landing License)	S-C-L-91-004	Filed: 6/18/91
2.	Statsionar 11 Non-Switched Private Line Service to Somalia	TAO-2339	Exp: 11/17/94

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SATELLITE TRANSMISSION AND RECEPTION SPECIALIST COMPANY (STARS)

TITLE II AUTHORIZATIONS

STARS

TITLE II AUTHORIZATIONS

	Service/Facilities	File Number	Citations
1.	Authorization to Establish Channels of Communications Between the U.S. and Intelsat Atlantic and Pacific Ocean Satellites for the Provision of International Television and Intelsat Business Services	I-T-C-89-090	4 FCC Rcd 5028 (1989)
2.	Authorization to Establish Channels of Communication Between the Houston International Teleport and Intelsat AOR Satellites for the Provision of International TV and IBS Services	I-T-C-85-070	Mimeo No. 3173 March 19, 1985

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IDB WORLDCOM, INC.

TITLE II AUTHORIZATIONS AND SUBMARINE CABLE LANDING LICENSES
(Includes Pending Applications)

IDB WORLDCOM, INC.
APPLICATION FOR CABLE LANDING LICENSE

PENDING

1. Private Submarine Fiber Optic Cable Between Puerto Rico and the Dominican Republic
File No. SCL-94-001
Filed: February 28, 1994

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IDB MOBILE COMMUNICATIONS, INC.

TITLE II AUTHORIZATIONS

IDB MOBILE COMMUNICATIONS, INC.
TITLE II FCC AUTHORIZATIONS

Title II Authorizations

1. International AMSS and MMSS
   (AOR-E via Staten Island, AOR-W and POR via Niles Canyon)
   Ship-to-shore and shore-to-ship
   File No. I-T-C-90-088
   Granted: May 8, 1991
   Domestic AMSS on an interim basis. (See Memorandum, Opinion and Order, FCC 92-25, released 2/6/92, ¶ 25, 7 FCC Rcd. 1006.)

2. International MMSS
   (IOR via Perth)
   Ship-to-shore and shore-to-ship
   File No. I-T-C-91-012
   Granted: October 21, 1991

3. International LMSS via INMARSAT
   (AOR-E via Staten Island, AOR-W and POR via Niles Canyon, and IOR via Perth.)
   Ship-to-shore and shore-to-ship
   File Nos. I-T-C-92-058/059
   Granted: February 2, 1993
   Supersedes STA File No. TAO-2081

4. INMARSAT-C
   (AOR-E via Netherlands, AOR-W via Southbury, POR via Australia)
   Ship-to-shore only
   File No. I-T-C-93-014
   Granted: January 29, 1993

5. INMARSAT-C
   (IOR via Perth)
   Ship-to-shore and shore-to-ship
   File No. I-T-C-93-013
   Granted: January 29, 1993

6. INMARSAT Standard B and Standard M
(AOR-E and AOR-W via Laurentides, Canada (ship-to-shore only). POR via Hong Kong (ship-to-shore only), and IOR via Hong Kong (ship-to-shore and shore-to-ship)).
File No. ITC-93-188
Granted: August 9, 1993

7. INMARSAT Standard B and Standard M
(AOR-E and AOR-W via Goonhilly, U.K.; POR and IOR via Perth, Australia)
Ship-to-shore only; Interim service
STA granted May 5, 1994; expires November 1, 1994

8. International Resale of Switched Voice, Data and Record Services (AT&T, MCI, Sprint and CCI)
File No. I-T-C-91-157
Granted: January 16, 1992

Title II Interconnection Authorizations

1. Authority to Interconnect LES Facilities with AT&T for Maritime Services
File No. ITC-93-142
Granted: November 26, 1993
Supersedes STA TAO-2262 granted July 30, 1993.

2. Authority to Interconnect LES Facilities with MCI for Maritime Services
File No. ITC-93-141
Granted: November 26, 1993

Appendix B

CICI, INC.

TITLE III AUTHORIZATIONS

CICI, INC.

TITLE III INTERNATIONAL EARTH STATION LICENSE

1. Wallops Island, Virginia
Call Sign: KA-339
File No. CSG-92-105-P/L
(Granted: August 25, 1992)
Expires: August 25, 2002
Private Carrier

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IDB COMMUNICATIONS GROUP, INC.

PRIVATE RADIO AUTHORIZATIONS

IDB COMMUNICATIONS GROUP, INC.

PRIVATE RADIO LICENSE
(BUSINESS RADIO)

1. Culver City, California
   Call Sign: KB89270
   File No. 8708091532
   (Granted: August 6, 1992)
   Expires: September 9, 1997

IDB MOBILE COMMUNICATIONS, INC.

EXPERIMENTAL RADIO LICENSE

rev. 8/10/94

IDB MOBILE COMMUNICATIONS, INC.

EXPERIMENTAL RADIO LICENSE

1. Experimental License KQ2XFQ
File No. 3619-EX-PL-93
File No. 4413-EX-ML-94
Granted: April 20, 1993; August 12, 1994
Expires: April 1, 1995
Bethesda, Maryland

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Appendix C

SOUTHWEST COMMUNICATIONS, INC.

TITLE II AUTHORIZATIONS

Rev. 8/10/94

TITLE II INTERNATIONAL COMMUNICATIONS SERVICES AUTHORIZATIONS HELD BY SOUTHWEST COMMUNICATIONS, INC.

SERVICE	FILE NUMBER	GRANT DATE
Authority to Establish Channels of Communication Between the U.S. and Intelsat Atlantic and Pacific Ocean Satellites for the Provision of International Television and IBS	I-T-C-92-085 DA 92-1220	9/2/92
Authority to Provide AMSS, MMSS and LMSS via the INMARSAT System	I-T-C-93-102	6/17/93

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Appendix D

SOUTHWEST COMMUNICATIONS, INC.: TITLE III
INTERNATIONAL EARTH STATION AUTHORIZATIONS
(ASSIGNED FROM IDB COMMUNICATIONS CORPORATION)

1. Culver City, California (KA-219)
   File No. CSG-87-036-P/L(A)
   (Granted: September 30, 1987)

2. Culver City, California (KA-222)
   File No. CSG-87-037-P/L
   (Granted: September 30, 1987)
   Expires: September 30, 1997
   File No. 1302-DSE-MP/L-94
   (Granted: July 29, 1994)
   Expires: July 29, 2004
   Private Carrier Status/Domestic

3. Culver City, California (KA-224)
   File No. CSG-88-073-P/L
   (Granted: September 8, 1988)(1998)
   Expires: September 8, 1988

4. Culver City, California
   File No. CSG-89-061-P/L
   (Granted: July 11, 1989)

5. Staten Island, New York (KA-228)
   File No. CSG-87-025-P/L
   (Granted: March 27, 1987)

6. Staten Island, New York
   File No. CSG-87-034-P/L
   (Granted: June 30, 1988)

7. Staten Island, New York (KA-234)
   File No. CSG-88-009-P/L
   (Granted: July 29, 1988)
   CSG-89-115-ML
   (Granted: February 12, 1992)
   CSG-92-002-ML (8/11/98)
   Expires: August 11, 1998

8. Staten Island, New York (KA-235)
   File No. CSG-88-010-P/L
   (Granted: July 29, 1988)
   CSG-89-116-ML
   (Granted: February 12, 1992)
   CSG-91-005-ML
   (Granted: May 13, 1991)(8/11/98)
   Expires: August 11, 1998

9. Manhattan, New York
Call Sign: WA 37
File No. CSG-84-004-P/L; CSG-94-098-R
(Granted: June 8, 1994)
Expires: April 11, 2004

10. Arlington, Virginia (KA-242)
File No. CSG-87-035-P/L
(Granted: June 30, 1988)(7/18/98)
Expires: July 18, 1998

11. Bellmawr, New Jersey
Call Sign: KA-67
File No. CSG-85-010-P/L (CSG-88-042-ML)
Expires: June 13, 1995

12. College Park, Georgia
Call Sign: KA-209
File No. CSG-87-001-P/L
Expires: December 3, 1996

13. Vallejo, California
Call Sign:
File No. CSG-88-089-P/L
(Granted: November 15, 1988)

14. Washington, D.C.
Call Sign: KA-77
File No. CSG-85-054-P/L
Expires: October 4, 1995

15. Vallejo, California
Call Sign: KA-97
File No. CSG-86-065-P/L
Expires: October 21, 1996

16. Vallejo, California
Call Sign: KA-98
File No. CSG-86-066-P/L
Expires: November 19, 1996

17. New York, New York
Call Sign: KA-230
File No. CSG-84-027-P/L (CSG-86-015-ML)
(CSG-88-088-ML)
Expires: July 6, 2004

18. Staten Island, New York
Call Sign: KA-285
File No. CSG-91-044-P/L and CSG-91-004-P/L(A)
Expires: June 27, 2001

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19. Staten Island, New York
Call Sign: KA-286
File No. CSG-89-074-P/L
Expires: June 27, 2001

20. Culver City, CA
Call Sign: KA-298
File No. CSG-91-048-P/L
Expires: September 4, 2001

21. Staten Island, New York
Call Sign: KA-308
File No. CSG-91-144-P/L
Expires: November 1, 2001

22. Santa Monica, California
Call Sign: KA-382 (R/O)
File No. CSG-93-120-P/L
Expires: September 28, 2003

23. Santa Monica, California
Call Sign: KA-383
File No. CSG-93-121-P/L
Expires: September 28, 2003

24. Staten Island, New York (Pending)
Call Sign:
File No. CSG-94-155-P/L
Filed: June 14, 1994

Rev. 8/10/94

SOUTHWEST COMMUNICATIONS, INC.: TITLE III INTERNATIONAL EARTH STATION AUTHORIZATIONS (ASSIGNED FROM CICI, INC.)

	Call Sign	Location	File Number	License Expires
1.	KA-63	Niles Canyon, CA (INMARSAT-AOR West)	CSG-85-004-P/L CSG-90-084-ML CSG-93-084-ML	4/5/95
2.	KA-76	Niles Canyon, CA (INMARSAT-POR)	CSG-86-017-P/L CSG-90-042-ML CSG-93-083-ML	5/13/96
3.	KA-227	New York Teleport (Staten Island, NY) (INMARSAT-AOR East)	CSG-87-027-P/L CSG-90-085-ML CSG-93-085-ML	8/17/97
4.	KA-300	Niles Canyon, CA (INMARSAT-POR) (2.4-m L-band)	CSG-91-054-P/L	9/18/01
5.	KA-65	Washington, DC (L'Enfant Plaza)	CSG-84-035-P/L (CSG-86-060-ML)	1/16/95
6.	WA-36	Staten Island, NY (New York Teleport)	CSG-83-034-P/L CSG-85-017-P/L CSG-94-093-R	4/11/04

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SOUTHWEST COMMUNICATIONS, INC.

TITLE III INTERNATIONAL EARTH STATION AUTHORIZATIONS
(ASSIGNED FROM
TRANSMISSION OPERATOR PROVIDED SYSTEMS, INC. ("TOPS"))

1. Houston, Texas (KA-414) (Private Carrier Status)
   File No. CSG-90-008-P/L; CSG-94-135-ML
   (Granted: May 11, 1990)
   Expires: May 11, 2000

2. Houston, Texas
   Call Sign: KA-62
   File No. CSG-85-003-P/L
   (Granted: March 19, 1985)
   Expires: March 19, 1995

3. Sylmar, California
   Call Sign: KA-309
   File No. CSG-89-075-P/L
   (Granted: June 22, 1989)
   Expires: June 22, 1999

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SOUTHWEST COMMUNICATIONS, INC.

TITLE III INTERNATIONAL EARTH STATION AUTHORIZATIONS
(ASSIGNED FROM TRT/FTC COMMUNICATIONS, INC.)

1. Carteret, New Jersey
   File No. CSG-87-029-M/L; CSG-94-003-ML
   Call Sign: KA-203
   (Granted: March 3, 1994)
   Expires: May 5, 1997

2. Carteret, New Jersey
   File No. CSG84-028-P/L; CSG-85-051-ML; CSG-94-170-R
   Call Sign: KA-46
   (Granted: October 11, 1984)
   Expires: August 31, 1994

3. Niles Canyon, California
   File No. CSG-86-073-P/L
   Call Sign: KA-82
   (Granted: January 5, 1987)
   Expires: December 12, 1996

4. Niles Canyon, California
   File No. CSG-86-073-P/L
   Call Sign: KA-93
   (Granted: January 5, 1987)
   Expires: December 12, 1996

5. Belleville, Illinois (Scott AFB)
   File No. CSG-86-072-P/L
   Call Sign: KA-92
   (Granted: January 20, 1987)
   Expires: November 14, 1996

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SOUTHWEST COMMUNICATIONS, INC.

PART 21 TITLE III POINT-TO-POINT MICROWAVE LICENSES

SOUTHWEST COMMUNICATIONS, INC.

TITLE III DOMESTIC MICROWAVE RADIO STATION AUTHORIZATIONS

1. Call Sign: KA 86496
   File No. 2960-CT-P/L-85
   (Local Television Transmission Service)
   Expires: February 1, 2001

2. Call Sign: WLL 345
   File No. 3373-CF-P/L-88
   (Temporary-Fixed Microwave)
   Expires: February 1, 2001

3. Culver City, CA
   Call Sign: WLM 377
   File No. 10033-CF-P/L-86
   File No. 1109-CF-P/L-87
   File No. 10268-CF-P-87
   File No. 10028-CF-P-89
   File No. 10422-CF-P-89
   File No. 10420-CF-P-89
   Expires: February 1, 2001

4. Bonneville, CA
   Call Sign: WLM 358
   File No. 3905-CF-P/L-86
   Expires: February 1, 2001

5. IDBWANG, CA
   Call Sign: WLU 771
   File No. 10027-CF-P-89
   Expires: February 1, 2001

6. JNEX, CA
   Call Sign: WLU 828
   File No. 10421-CF-P-89
   Expires: February 1, 2001

7. KSCI, CA
   Call Sign: WLV 503
   File No. 11098-CF-P-90
   (Granted: September 14, 1990) (10 years)

8. IDBFRM, CA
   Call Sign: WLM 975
   File No. 1272-CF-P/L-87
   Expires: February 1, 2001

9. IDBBLD, CA
Call Sign: WLM 976
File No. 1273-CF-P/L-87
File No. 10269-CF-P-87
File No. 10270-CF-P-87
File No. 11306-CF-P-88
Expires: February 1, 2001

10. IDBLOR, CA
Call Sign: WLN 824
File No. 10271-CF-P-87
File No. 11305-CF-P-88
Expires: February 1, 2001

11. Santa Paula, CA
Call Sign: WLN 539
File No. 3173-CF-P-87
File No. 10966-CF-P/ML-87
Expires: February 1, 2001

12. South Mountain, CA
Call Sign: WLN 540
File No. 3174-CF-P-87
File No. 2461-CF-P/ML-88
Expires: February 1, 2001

13. Saddle Peak, CA
Call Sign: WLN 541
File No. 3175-CF-P-87
File No. 2460-CF-P/ML-88
Expires: February 1, 2001

14. Sunset, CA
Call Sign WLN 542
File No. 3176-CF-P-87
File No. 10419-CF-P-89
File No. 2459-CF-P/ML-88
Expires: February 1, 2001

15. CAL FED/E! CA
Call Sign: WMJ266
File No. 12306-CF-P-91
Expires: February 1, 2001

16. KJOI, CA
Call Sign: WHQ654
File No. 25179-CF-R-91
13301-CF-AL-93
Expires: February 1, 2001

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17. Call Sign: WLW 243
File No. 16931-CT-P/L-90
(Local Television Transmission Service)
Granted: May 23, 1990

18. Call Sign: WLW 244
File No. 16932-CT-P/L-90
(Local Television Transmission Service)
Granted: May 23, 1990

19. Call Sign: WLW 245
File No. 16933-CT-P/L-90
(Local Television Transmission Service)
Granted: May 23, 1990

20. Allied, Houston, Texas
Call Sign: WLS 828
File No. 15426-CF-P-91; 22529-CF-L-92
Granted: March 18, 1991

21. HIT, Houston, Texas
Call Sign: WLS 827
File No. 15427-CF-P-91; 22528-CF-L-92
Granted: March 18, 1991

22. KJOI, Sylmar, California
Call Sign: WLU 842
File No. 10452-CF-P-89
Granted: October 12, 1989

23. KCAL, N. Hollywood, California
Call Sign: WLS 822
File No. 15413-CF-P-91
Granted: March 18, 1991

24. KJOI, Sylmar, California
Call Sign: WLS 823
File No. 15414-CF-P-91
Granted: March 18, 1991

25. Sylmar, California
Call Sign: WLS 824
File No. 15415-CF-P-91
Granted: March 18, 1991

26. KJOI, Sylmar, California
Call Sign: WLS 825
File No. 15416-CF-P-91
Granted: March 18, 1991

27. Allied (FIB), Houston, Texas
Call Sign: WMQ 516
File No. 9306266
Granted: 1/24/94
Expires: 2/01/01

28. HTE (HSE3), Houston, Texas
Call Sign: WMQ 514
File No. 9306264
Granted: 1/24/94
Expires: 2/01/01

29. KPRC, Missouri City, Texas
Call Sign: WMQ 515
File No. 9306265
Granted: 1/24/94
Expires: 2/01/01

30. KHOU, Houston, Texas
Call Sign: WMQ 513
File No. 9306263
Granted: 1/24/94
Expires: 2/01/01

31. JSFC, Webster, Texas
Call Sign: WMQ 517
File No. 9306267
Granted: 1/24/94
Expires: 2/01/01

32. Blanket Special Temporary Authority
WMN 971
Expires: 10/15/94

33. Staten Island, New York (Pending)
Call Sign:
File No. 9408320*/
Filed: 7/21/94

34. Jersey City, New Jersey (Pending)
Call Sign:
File No. 9408321*/
Filed: 7/21/94

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*/ Blanket Special Temporary Authority (WMN971) will allow construction and operation of these facilities prior to grant of application.

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SOUTHWEST COMMUNICATIONS, INC.

PART 25 TITLE III SATELLITE EARTH STATION LICENSES

SOUTHWEST COMMUNICATIONS, INC. TITLE III DOMESTIC EARTH STATION AUTHORIZATIONS (ASSIGNED FROM IDB COMMUNICATIONS CORPORATION)

Fixed Domestic Earth Stations

1. Culver City, California
(Private Carrier Status Pending)
Call Sign: E7754 (4 antennas)
File No. 2043-DSE-P/L-84
(Granted: June 4, 1985)
File No. 1605-DSE-MP/ML-86
(Granted: September 26, 1986)
File No. 5411-DSE-MP/ML-87
(Granted: June 3, 1988)
File No. 5406-DSE-MP/ML-87
(Granted: June 3, 1988)
Expires: June 4, 1995

2. Culver City, California
(Private Carrier Status Pending)
Call Sign: E881143 (4 antennas)
File No. 2083-DSE-MP/L-88
(Granted: November 4, 1988)
File No. 2084-DSE-MP/L-88
(Granted: November 4, 1988)
File No. 2031-DSE-MP/L-89
(Granted: November 24, 1989)
Expires: June 4, 1995

3. Culver City, California (Private Carrier Status)
Call Sign: E860811 (5 antennas)
File No. 1601-DSE-P/L-86
(Granted: July 31, 1987)
File No. 1973-DSE-MP/L-89
(Granted: November 3, 1989)
Expires: July 31, 1997

4. Staten Island, New York (Private Carrier Status)
Call Sign: E872073 (2 antennas)
File No. 2777-DSE-P/L-87
(Granted: August 7, 1987)
Expires: August 7, 1997

5. Staten Island, New York (Private Carrier Status)
Call Sign: E872650 (2 antennas)
File No. 3591-DSE-P/L-87
(Granted: January 22, 1988)
Expires: January 22, 1998

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6. Staten Island, New York (Private Carrier Status)
Call Sign: E7863
File No. 2235-DSE-P/L-85
(Granted: May 30, 1986)
Expires: May 30, 1996
Call Sign: E920705 (Hybrid)
File No. 2609-DSE-P/L-92
(Granted: June 3, 1994)
Expires: May 30, 1996

7. Staten Island, New York (Private Carrier Status)
Call Sign: E9146
File No. 1653-DSE-P/L-85
(Granted: July 7, 1989)
Expires: July 7, 1999

8. Staten Island, New York (Private Carrier Status)
Call Sign: E5167
File No. 2783-DSE-MP/L-88
(Granted: September 23, 1988)
Expires: March 16, 2003

9. Cincinnati, Ohio
Call Sign: E860068
File No. 173-DSE-P/L-86
(Granted: July 2, 1986)
Expires: July 2, 1996

10. Seattle, Washington
Call Sign: E860919
File No. 1742-DSE-P/L-86
(Granted: September 12, 1986)
Expires: September 12, 1996

11. Los Angeles, California
Call Sign: E860194
File No. 432-DSE-P/L-86
(Granted: September 19, 1986)
Expires: September 19, 1996

12. Milwaukee, Wisconsin
Call Sign: E850092
File No. 2864-DSE-P/L-85
(Granted: September 26, 1986)
Expires: September 26, 1996

13. Atlanta, Georgia
Call Sign: E861077
File No. 2472-DSE-P/L-86
(Granted: October 10, 1986)
Expires: October 10, 1996

14. Detroit, Michigan
Call Sign: E861076
File No. 2471-DSE-P/L-86
(Granted: October 10, 1986)
Expires: October 10, 1996

15. Allison Park, Pennsylvania (Pittsburgh)
Call Sign: E861074
File No. 2469-DSE-P/L-86
(Granted: October 10, 1986)
Expires: October 10, 1996

16. Missouri City (Houston), Texas
Call Sign: E870032
File No. 71-DSE-P/L-87
(Granted: December 31, 1986)
Expires: December 31, 1996

17. Tampa, Florida
Call Sign: E870031
File No. 70-DSE-P/L-87
(Granted: December 31, 1986)
Expires: December 31, 1996

18. Salt Lake City, Utah
Call Sign: E870502
File No. 845-DSE-P/L-87
(Granted: February 27, 1987)
Expires: February 27, 1997

19. Baltimore, Maryland
Call Sign: E890936
File No. 1942-DSE-P/L-89
(Granted: October 27, 1989)
Expires: October 27, 1999

20. Charlotte, North Carolina
Call Sign: E890984
File No. 2065-DSE-P/L-89
(Granted: November 3, 1989)
Expires: November 3, 1999

21. Kansas City, Missouri
Call Sign: E890938
File No. 1944-DSE-P/L-89
(Granted: October 27, 1989)
Expires: October 27, 1999

22. Dallas, Texas
Call Sign: E900219
File No. 867-DSE-P/L-90
(Granted: August 10, 1990)
Expires: August 10, 2000

23. Arlington, Virginia
Call Sign: E872072
File No. 2776-DSE-P/L-87
(Granted: June 16, 1989)
Expires: June 16, 1999

24. Dallas, Texas (IDB Systems)
Call Sign: E890975
File No. 2026-DSE-P/L-89
(Granted: October 20, 1989)
Expires: October 20, 1999

25. Culver City, CA (3.7-m Ku)
(Private Carrier Status)
Call Sign: E910561
File No. 1665-DSE-P/L-91
(Granted: October 25, 1991)
File No. CSG-92-064-ML
(Granted: April 24, 1992)
Expires: October 25, 2001

26. Staten Island, New York (Private Carrier Status)
Call Sign: E930097
File No. 359-DSE-P/L-93
(Granted: February 12, 1993)
Expires: February 12, 2003

27. Staten Island, New York (Private Carrier Status)
Call Sign E930435 (2 antennas)
File no. 3150-DSE-P/L-93
(Granted: October 29, 1993)
Expires: October 29, 2003

Transportable Earth Stations (C-Band)
(Private Carrier Status Items 28-53)

28. Transportable earth station
Call Sign: E5713
File No. 1059-DSE-P/L-83
(Granted: July 14, 1989)
Expires: July 14, 1995

29. Transportable earth station
Call Sign: E859576
File No. 2186-DSE-P/L-85
(Granted: July 14, 1989)
Expires: July 14, 1995

30. Transportable earth station
Call Sign: E859577
File No. 2187-DSE-P/L-85
(Granted: July 14, 1989)
Expires: July 14, 1995

31. Transportable earth station
Call Sign: E881492
File No. 3134-DSE-P/L-88
(Granted: July 14, 1989)
Expires: July 14, 1995

32. Transportable earth station
Call Sign: E881493
File No. 3135-DSE-P/L-88
(Granted: July 14, 1989)
Expires: July 14, 1995

33. Transportable earth station
Call Sign: E881495
File No. 3137-DSE-P/L-88
(Granted: July 14, 1989)
Expires: July 14, 1995

34. Transportable earth station
Call Sign: E881496
File No. 3138-DSE-P/L-88
(Granted: July 14, 1989)
Expires: July 14, 1995

35. Transportable earth station
Call Sign: E6391*/
File No. 2103-DSE-P/L-83
(Granted: September 19, 1986)
Expires: November 18, 1994

36. Transportable earth station
Call Sign: E6393*/
File No. 2101-DSE-P/L-83
(Granted: September 19, 1986)
Expires: November 18, 1994

37. Transportable earth station
Call Sign: E7635*/
File No. 1886-DSE-P/L-84
(Granted: September 19, 1986)
Expires: November 18, 1994

38. Transportable earth station
Call Sign: E7616
File No. 1859-DSE-P/L-84
(Granted: August 22, 1986)
Expires: February 2, 1995

39. Transportable earth station
Call Sign: E7508*/
File No. 1689-DSE-P/L-84
(Granted: September 19, 1986)
Expires: November 18, 1994

40. Transportable earth station
Call Sign: E7106
File No. 1065-DSE-P/L-84
(Granted: September 19, 1986)
Expires: November 18, 1994

41. Transportable earth station
Call Sign: E890930*/
File No. 1933-DSE-P/L-89
(Granted: October 27, 1989)
Expires: March 22, 1995

42. Transportable earth station
Call Sign: E890941*/
File No. 1947-DSE-P/L-89
(Granted: October 27, 1989)
Expires: March 22, 1995

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*/ STA File No. 3168-SSA-EXT-93(11). Operate video at 955 watts.

43. Transportable earth station
Call Sign: E890942*/
File No. 1948-DSE-P/L-89
(Granted: October 27, 1989)
Expires: March 22, 1995

44. Transportable earth station
Call Sign: E881092
File No. 2169-DSE-P/L-88
(Granted: October 7, 1988)
Expires: March 9, 1995

45. Transportable earth station
Call Sign: E890985
File No. 2066-DSE-P/L-89
(Granted: November 3, 1989)
Expires: April 5, 1995

46. Transportable earth station
Call Sign: E890986
File No. 2069-DSE-P/L-89
(Granted: November 3, 1989)
Expires: April 5, 1995

47. Transportable earth station
Call Sign: E890987
File No. 2070-DSE-P/L-89
(Granted: November 3, 1989)
Expires: April 5, 1995

48. Transportable earth station
Call Sign: E890988
File No. 2071-DSE-P/L-89
(Granted: November 3, 1989)
Expires: April 5, 1995

49. Transportable earth station
Call Sign: E890995*/
File No. 2093-DSE-P/L-89
Expires: December 22, 1994

50. Transportable earth station
Call Sign: E890996*/
File No. 2094-DSE-P/L-89
Expires: December 22, 1994

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*/ STA File No. 3168-SSA-EXT-93(11). Operate video at 955 watts.

51. Transportable earth station
Call Sign: E890997*/
File No. 2095-DSE-P/L-89
Expires: December 22, 1994

52. Transportable earth station
Call Sign: E890998*/
File No. 2096-DSE-P/L-89
Expires: December 22, 1994

53. Transportable earth station
Call Sign: E920027
File No. 78-DSE-P/L-92
Expires: December 13, 1994
File No. CSG-92-063-ML
(Granted: April 24, 1992)

Transportable Earth Stations (Ku-Band)

54. Transportable earth station
Call Sign: E871852
File No. 2549-DSE-P/L-87
Expires: December 24, 1999

55. Transportable earth station
Call Sign: E860907
File No. 1719-DSE-P/L-86; CSG-92-113-(6)-ML
Expires: July 7, 1999

56. Transportable earth station
Call Sign: E870238
File No. 412-DSE-P/L-87; CSG-92-113-(6)-ML
Expires: July 7, 1999

57. Transportable earth station
Call Sign: E865134
File No. 5134-DSE-P/L-86
Expires: July 7, 1999

Items 58-89 are all Ku-band transportable earth stations for which construction permits and licenses were granted on August 4, 1989 and expire on August 4, 1999.

58. Call Sign: E881449
File No. 3091-DSE-P/L-88

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*/ STA File No. 3168-SSA-EXT-93(11). Operate video at 955 watts.

59. Call Sign: E881450
File No. 3092-DSE-P/L-88

60. Call Sign: E881451
File No. 3093-DSE-P/L-88

61. Call Sign: E881452
File No. 3094-DSE-P/L-88

62. Call Sign: E881453
File No. 3095-DSE-P/L-88

63. Call Sign: E881454
File No. 3096-DSE-P/L-88

64. Call Sign: E881455
File No. 3097-DSE-P/L-88

65. Call Sign: E881456
File No. 3098-DSE-P/L-88

66. Call Sign: E881457
File No. 3099-DSE-P/L-88

67. Call Sign: E881458
File No. 3100-DSE-P/L-88

68. Call Sign: E881459
File No. 3101-DSE-P/L-88

69. Call Sign: E881460 (Private Carrier Status)
File No. 3102-DSE-P/L-88

70. Call Sign: E881461 (Private Carrier Status)
File No. 3103-DSE-P/L-88

71. Call Sign: E881462 (Private Carrier Status)
File No. 3104-DSE-P/L-88

72. Call Sign: E881463 (Private Carrier Status)
File No. 3105-DSE-P/L-88

73. Call Sign: E881464 (Private Carrier Status)
File No. 3106-DSE-P/L-88

74. Call Sign: E881465
File No. 3107-DSE-P/L-88

75. Call Sign: E881466
File No. 3108-DSE-P/L-88

76. Call Sign: E881467
File No. 3109-DSE-P/L-88

77. Call Sign: E881468
File No. 3110-DSE-P/L-88

78. Call Sign: E881469
File No. 3111-DSE-P/L-88

79. Call Sign: E881470
File No. 3112-DSE-P/L-88

80. Call Sign: E881471
File No. 3113-DSE-P/L-88

81. Call Sign: E881472
File No. 3114-DSE-P/L-88

82. Call Sign: E881473
File No. 3115-DSE-P/L-88

83. Call Sign: E881474
File No. 3116-DSE-P/L-88

84. Call Sign: E881475
File No. 3117-DSE-P/L-88

85. Call Sign: E881476
File No. 3118-DSE-P/L-88

86. Call Sign: E881477
File No. 3119-DSE-P/L-88

87. Call Sign: E881478
File No. 3120-DSE-P/L-88

88. Call Sign: E881479
File No. 3121-DSE-P/L-88

89. Call Sign: E881480
File No. 3122-DSE-P/L-88

SOUTHWEST COMMUNICATIONS, INC.

TITLE III DOMESTIC EARTH STATION AUTHORIZATIONS
(ASSIGNED FROM
TRANSMISSION OPERATOR PROVIDED SYSTEMS, INC. ("TOPS"))

FIXED DOMESTIC EARTH STATIONS

1. Houston, Texas
   Call Sign: E8074
   File No. 106-DSE-P/L-85
   (Granted: September 30, 1986)
   Expires: September 30, 1996

2. Houston, Texas (Private Carrier Pending)
   Call Sign: E859694
   File No. 1952-DSE-MP/L-92; 993-DSE-MP/L-94;
   CSG-93-027-ML
   (Granted: November 13, 1992)
   Expires: December 8, 1999

3. Houston, Texas (Private Carrier Pending)
   Call Sign: E900472
   File No. 1347-DSE-P/L-90; 1129-DSE-MP/L-94
   (Granted: March 29, 1991)
   Expires: March 29, 2001

4. Sylmar, California
   Call Sign: E890790
   File No. 1558-DSE-P/L-89
   (Granted: September 22, 1989)
   Expires: September 22, 1999

5. Sylmar, California
   Call Sign: E910117
   File No. 290-DSE-P/L-91
   (Granted: January 25, 1991)
   Expires: January 25, 2001

TRANSPORTABLE EARTH STATIONS (C-BAND)

6. Transportable Earth Station
   (Private Carrier Status)
   Call Sign: E910147
   File No. 1945-DSE-P/L-92
   (Granted: March 29, 1991)
   Expires: September 25, 1994
   STA 1483-SSA-EXT-92*/

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*/ STA to operate video at 955 watts.

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7. Transportable Earth Station
(Private Carrier Status)
Call Sign: E910148
File No. 1941-DSE-P/L-92
(Granted: March 29, 1991)
Expires: September 25, 1994
STA 1484-SSA-EXT-92*/

8. Transportable Earth Station
(Private Carrier Status)
Call Sign: E910149
File No. 1940-DSE-P/L-92
(Granted: March 29, 1991)
Expires: September 25, 1994
STA 1485-SSA-EXT-92*/

9. Transportable Earth Station
(Private Carrier Status)
Call Sign: E910150
File No. 1943-DSE-P/L-92
(Granted: March 29, 1991)
Expires: September 25, 1994
STA 1486-SSA-EXT-92*/

10. Transportable Earth Station
(Private Carrier Status)
Call Sign: E910151
File No. 1944-DSE-P/L-92
(Granted: March 29, 1991)
Expires: September 25, 1994
STA 1487-SSA-EXT-92*/

11. Transportable Earth Station
(Private Carrier Status)
Call Sign: E910164
File No. 1942-DSE-P/L-92
(Granted: March 29, 1991)
Expires: September 25, 1994
STA 1488-SSA-EXT-92*/

12. Transportable Earth Station
(Private Carrier Status)
Call Sign: E910255
File No. 1946-DSE-P/L-92
(Granted: April 26, 1991)
Expires: September 25, 1994
STA 1489-SSA-EXT-92*/

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*/ STA to operate video at 955 watts.

13. Transportable Earth Station
(Private Carrier Status)
Call Sign: E920096
File No. 254-DSE-P/L-92
(Granted: January 17, 1992)
Expires: January 17, 1995

VERY SMALL APERTURE TERMINAL SYSTEM

14. VSAT Network (Private Carrier Status)
Call Sign: E859694 (Hub Station)(Houston, Texas)
File No. 1952-DSE-MP/L-92
Call Sign: E891032 (250 terminals)
File No. 2238-DSE-P/L-89
Call Sign: E891033 (4,000 terminals)(400)
File No. 2239-DSE-P/L-89
Call Sign: E891034 (750 terminals)
File No. 2240-DSE-P/L-89
(Granted: November 13, 1992)
Expires: December 8, 1999

Rev. 8/10/94

SOUTHWEST COMMUNICATIONS, INC.

TITLE III DOMESTIC EARTH STATION AUTHORIZATIONS
(ASSIGNED FROM TRT/FTC COMMUNICATIONS, INC.)

1. Carteret, New Jersey
   Call sign: E900454
   File No. 1290-DSE-P/L-90
   (Granted: August 10, 1990)
   Expires: August 10, 2000

2. San Bernardino, California (Private Carrier Status)
   Call Sign: E874293
   File No. 6096-DSE-P/L-87
   (Granted: December 11, 1987)
   Expires: December 11, 1997

3. Eddystone, Pennsylvania (Private Carrier Status)
   Call Sign: E872333
   File No. 3246-DSE-P/L-87
   (Granted: June 26, 1987)
   Expires: June 26, 1997

4. Huntsville, Alabama (Private Carrier Status)
   Call Sign: E872082
   File No. 2787-DSE-P/L-87
   (Granted: June 26, 1987)
   Expires: June 26, 1997

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Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-571

In the Matter of

Telecommunications Relay Services,
and the Americans with Disabilities
Act of 1990

ORDER

Adopted: December 28, 1994; Released: December 30, 1994

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On September 30, 1994, pursuant to Section 64.604(c)(4)(iii)(H) of the Commission's Rules, 47 C.F.R. §64.604 (c)(4)(iii)(H), the Telecommunications Relay Services (TRS) Interim Fund Administrator, the National Exchange Carrier Association, Inc. (NECA) filed its annual report. The report includes the proposed TRS payment formula for the 1995 calendar year, and the fund size estimate for the period April 1995 through March 1996.[1] In response to NECA's report, three comments and four replies were filed.[2] Based on our review of the above filings, we approve NECA's proposed payment rate for 1995. In addition, we have calculated the contribution factor for the April 26, 1995 through March 26, 1996 period,[3] and are adopting this contribution factor as well as the 1995 TRS Fund Worksheet, FCC Form 431.[4]

II. BACKGROUND

2. The Americans with Disabilities Act of 1990 (ADA)[5] requires the Commission to ensure that telecommunications relay services[6] are available, to the extent possible, to individuals with hearing and speech disabilities in the United States.[7] To fulfill this mandate, the Commission adopted rules which require the provision of TRS services, set minimum standards for TRS providers and establish a shared-funding mechanism (TRS Fund) for recovering the costs of providing interstate TRS. *See* 47 C.F.R. §§ 64.601 - 64.605. The Commission also appointed NECA the TRS Fund administrator for an interim two year period ending July 25, 1995,[8] and directed NECA to establish a non-paid, voluntary advisory committee to oversee cost recovery matters.[9]

3. The Commission's rules require all carriers providing interstate telecommunications services to contribute to the TRS Fund.[10] The amount contributed is the product of the carrier's gross interstate revenues for the previous year times a contribution factor determined annually by the Commission.[11] Contributions are calculated in accordance with a TRS Fund Worksheet which is prepared by the Commission and published in the Federal Register.[12] Payments from the fund are made to eligible TRS providers and are designed to cover the reasonable costs incurred in providing interstate TRS service.[13] The TRS Fund administrator files a proposed payment formula and estimated fund requirements with the Commission each year,[14] and this payment formula is subject to Commission approval.[15] Most recently, the Commission adopted a contribution factor of .00030 for the April 26, 1994 through March 26, 1995 period,[16] and approved a payment rate of $1.705 per interstate TRS minute of use for the 1994 calendar year.[17]

III. DISCUSSION

A. Payment Formula and Fund Estimate

4. *NECA Filing.* NECA has proposed a payment rate of $1.304 per interstate TRS minute of use for the 1995 calendar year. NECA also has projected nationwide interstate TRS demand of 19.0 million minutes for the April 1995 through March 1996 period. These estimates are based on cost and demand data submitted to NECA by

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[1] *See* Public Notice, No. 50141 (October 13, 1994).

[2] Comments were filed by AT&T Corp. (AT&T), MCI Telecommunications Corp. (MCI) and Sprint Communications Company, L.P. (Sprint). Replies were filed by AT&T, NECA, Sprint and G. Richard Klein, Commissioner of the Indiana Utility Regulatory Commission, filing as an individual (Klein).

[3] *See* 47 C.F.R. § 64.604(c)(4)(iii)(B).

[4] *See* Appendix A.

[5] *See* S.933, Pub. L. 101-336, 104 Stat. 327, 366-69 (July 26, 1990).

[6] Telecommunications relay services (TRS) permit persons with hearing and speech disabilities to communicate by telephone with persons who do not have such disabilities. TRS facilities are equipped with specialized equipment and staffed by communications assistants (CAs) who relay conversations between people who use text telephones and people who use traditional telephones.

[7] *See* Section 225 of the Communications Act of 1934, as amended, 47 U.S.C. § 225. Title IV of the ADA added Section 225 to the Communications Act.

[8] *See* Telecommunications Relay Services, and the Americans with Disabilities Act of 1990, CC Docket No. 90-571, Third Report and Order, 8 FCC Rcd 5300, 5300-01 (1993).

[9] *Id.* at 5301; 47 C.F.R. § 64.604(c)(4)(iii)(H). *See also* Telecommunications Relay Services, and the Americans with Disabilities Act of 1990, CC Docket No. 90-571, Second Order on Reconsideration and Fourth Report and Order, 9 FCC Rcd 1637, 1639-40 (1993).

[10] 47 C.F.R. § 64.604(c)(4)(iii)(A).

[11] 47 C.F.R. § 64.604(c)(4)(iii)(B).

[12] 47 C.F.R. § 64.604(c)(4)(iii)(B).

[13] 47 C.F.R. § 64.604(c)(4)(iii)(E).

[14] 47 C.F.R. § 64.604(c)(4)(iii)(H).

[15] 47 C.F.R. § 64.604(c)(4)(iii)(E).

[16] *See* Telecommunications Relay Services, and the Americans with Disabilities Act of 1990, CC Docket No. 90-571, Order, 9 FCC Rcd 1783 (Com. Car. Bur. 1994).

[17] *See* Telecommunications Relay Services, and the Americans with Disabilities Act of 1990, CC Docket No. 90-571, Second Order on Reconsideration and Fourth Report and Order, 9 FCC Rcd 1637, 1638 (1993).

TRS providers. For the April 1995 through March 1996 period, NECA has estimated administrative costs of $375,000, interest income of $357,000, and a total TRS fund requirement of $24.8 million.[18]

5. *Comments.* In their comments, AT&T and Sprint both express concern about whether NECA's estimates take into account the projected costs of providing TRS for coin-sent paid calls.[19] They state that TRS providers will be required to handle such calls beginning July 26, 1995,[20] and that the technical changes involved could cost millions of dollars. Sprint suggests that the Commission could approve the proposed payment formula and fund size estimate only until July 25, 1995, and require NECA to submit a revised payment formula and fund size for the period beginning July 26, 1995. AT&T states that Sprint's proposal has merit, but asks, as a threshold matter, that the Commission clarify whether such costs are to be recovered through the TRS Fund or through some other regulatory mechanism. NECA, in its reply, states that its estimates do not include the cost of providing coin-sent paid calls, that the necessary cost data for such calls is not yet available, and that it will monitor this situation and will consider proposing an amended payment formula or revised fund estimate if necessary.

6. AT&T also expresses concern that certain ineligible operating expenses may have been included in NECA's computations. Specifically, AT&T states that the Texas state relay center is providing Spanish to English translation for TRS customers, and that if costs associated with this service were included in NECA's computations, NECA should be required to remove such costs from its calculations. Sprint, which operates the Texas state relay center, replies that this service is offered only in Texas, that the number of bilingual interstate calls is extremely small (Sprint estimates that there were only ten such calls in September 1994), and that any additional costs were negligible. NECA, in its reply, notes that the Texas relay center's costs were actually significantly lower than average.

7. *Decision.* After reviewing the NECA filing and the comments, we have decided to approve NECA's proposed payment rate and fund size estimate. Adjustments to reflect the costs of coin-sent paid calls would be premature at this time. The issue of how such calls will be handled is still being negotiated by the affected parties, and it is too early to predict what solution will be adopted, or what costs may be incurred. We also decline to adopt Sprint's suggestion that the payment formula and fund size estimate be approved only until July 25, 1995, as this approach would necessitate our revisiting the payment issue in July, when such a step may not, in fact, prove to be necessary. Regarding the Texas relay center costs, it appears that any additional costs attributable to translation services were small, and that their inclusion would not have had any practical impact on the payment amount or fund size estimate computed by NECA. Accordingly, we find that recalculation of these figures is unnecessary. No other objections to NECA's estimates have been raised, and we have reviewed NECA's filing and found it to be acceptable. Accordingly, pursuant to Section 64.604(c)(4)(iii)(E) of the rules, we approve the proposed payment rate of $1.304, per minute of interstate TRS use, for the 1995 calendar year.

B. Contribution Factor and 1995 TRS Fund Worksheet

8. In addition, based on NECA's estimates, and pursuant to the requirements of Section 64.604(c)(4)(iii)(B) of the rules, we are setting a contribution factor of .00023 for the April 26, 1995 through March 26, 1996 period. This contribution factor is based on a projected funding base for 1994 gross carrier interstate revenues of $77.6 billion, 1995 projected TRS payments of $24.8 million, a 1994 carryover of $10.111 million, a safety margin of 10 percent, and a net 1995 funding requirement of $17.217 million.[21] We are also adopting the 1995 TRS Fund Worksheet, FCC Form 431, attached as Appendix A.[22] *See* Section 64.604(c)(4)(iii)(B).

C. Administrative Issues

9. *NECA Filing.* NECA's filing also included (1) a recommendation that NECA be reappointed Fund administrator when its current term expires on July 25, 1995; and (2) a request from the TRS advisory committee for authorization to add two additional members.[23] Under the Commission's rules, the advisory committee consists of persons from the hearing and speech disability community, TRS users, interstate service providers, TRS providers, and state representatives.[24] The Commission has authorized NECA to reimburse up to two individuals from each of the above categories for reasonable costs incurred in attending committee meetings.[25] In its current filing, NECA indicates that two state commissioners currently occupy the two positions available in the state representative category, and that these individuals are providing useful assistance to the committee. However, the committee has determined that participation by state relay administrators would also be useful. Accordingly, the committee directed NECA to request authority to add two state relay administrators to the state representative category.

10. *Comments.* MCI opposes the above administrative proposals. First, MCI contends that NECA should not be reappointed administrator because NECA has failed to satisfactorily administer other funds. MCI argues that the appointment should be offered for competitive bid, or, at the very least, that NECA's reappointment should be deferred until after the Commission has reviewed an independent audit of NECA's administration of the TRS Fund. MCI also opposes adding two additional TRS advisory committee members because (1) this would result in increased costs, (2) the need for additional members had not been established, and (3) the committee could achieve the desired participation, without increased costs, by having the state representative category consist of one state commissioner and one state relay administrator. In reply com-

[18] *See* NECA filing at Exhibit 4.

[19] Coin-sent paid calls are calls made by inserting coins into a traditional coin-operated public telephone. *See* Telecommunications Relay Services, and the Americans with Disabilities Act of 1990, CC Docket No. 90-571, Order, 8 FCC Rcd 8385 (Com. Car. Bur. 1993).

[20] *See* 8 FCC Rcd at 8385.

[21] *See* Appendix B.

[22] The 1995 TRS Fund Worksheet is being submitted to the Office of Management and Budget (OMB) for review and shall be effective upon approval by OMB.

[23] *See generally*, para. 2, *supra*.

[24] *See* 47 C.F.R. § 64.604(c)(4)(iii)(H).

[25] *See* 9 FCC Rcd at 1640.

ments, NECA and Klein support NECA's reappointment and AT&T states that, assuming a satisfactory audit, there appears to be no reason to deny extension of NECA's term. NECA and Klein also support authorizing two additional committee members, and argue that the costs involved would be *de minimis* and far outweighed by the benefits to be achieved.

11. *Decision.* In its July, 1993 order, the Commission stated "[w]e are persuaded that MCI's proposal that NECA serve an interim term as administrator and report its administrative costs to the Commission on an annual basis is an appropriate approach. Therefore, we shall review NECA's performance after two years. Further, we will entertain proposals by other parties interested in functioning as future administrator of the TRS fund and shall solicit comment and alternative proposals." 8 FCC Rcd at 5301. NECA's reappointment will be considered in the context of a separate proceeding that will be initiated by public notice. When we review the performance of the current fund administrator we will also consider any adjustments needed in the composition of the advisory committee.

IV. CONCLUSION

12. For the reasons set forth above, we approve the payment rate proposed by NECA for the 1995 calendar year. In addition, we adopt the new contribution factor set forth herein, and the 1995 TRS Fund Worksheet. Issues concerning appointment of the fund administrator, and composition of the TRS advisory committee, will be addressed in a separate proceeding that will be initiated by public notice. These actions will further the goal of the ADA to provide functionally equivalent telecommunications services for all Americans.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, pursuant to Section 225 of the Communications Act of 1934, as amended, 47 U.S.C. § 225, that the payment rate of $1.304 to TRS providers per interstate minute of use is approved, and shall be in effect from January 1, 1995 through December 31, 1995.

14. IT IS FURTHER ORDERED, that the TRS Fund contribution factor shall be .00023 for the period April 26, 1995 through March 26, 1996.

15. IT IS FURTHER ORDERED, that the 1995 TRS Fund Worksheet is hereby adopted, subject to approval by the Office of Management and Budget.

16. IT IS FURTHER ORDERED, that the Secretary shall provide a copy of this Order to each state utility commission and to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

Appendix A

TRS Fund Worksheet

Estimated Average Burden Hours Per Response: 2 hours.

Instructions for Completing the Worksheet for Calculating and Filing Carrier Contributions to fund Interstate Telecommunications Relay Service (TRS).

NOTICE TO INDIVIDUALS

Section 64.604(c)(4)(iii) of the Commission's Rules requires all carriers providing interstate service to complete this worksheet and to contribute funding for interstate Telecommunications Relay Services (TRS). The collection of information and fees stems from the Commission's authority under the Communications Act of 1934, Sections 4, 48, 48 Stat. 1066, as amended, 47 U.S.C. 154 unless otherwise noted. Interpret or apply Sections 201, 211, 218, 219, 220, 225 48 Stat. 1073, 1077, as amended; 47 U.S.C. 201, 211, 218, 219, 220, 225. The data in the report will be used to ensure that carriers properly fund interstate TRS. Selected information provided in the worksheet will be made available to the public in a manner consistent with the Commission's Rules. All carriers providing interstate telecommunications service must file this worksheet. Other telecommunications carriers may voluntarily file this worksheet.

The foregoing Notice is required by the Privacy Act of 1974, P.L. 93.579, December 31, 1974, 5 U.S.C. 552(a)(e)(3), and the Paperwork Reduction Act of 1980. P.L. 96-511, Section 3504(c)(3).

Public reporting burden for this collection of information is estimated to average 2 hours per response including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the reporting burden to the Federal Communications Commission, Office of Managing Director, Washington, DC 20554, and the Office of Information and Regulatory Affairs, Office of Management and Budget, Paperwork Reduction project (3060), Washington, DC 20503.

I. Introduction.

On July 15, 1993, the Commission adopted rules that require all providers of interstate telecommunications services to contribute to the provision of TRS based on their proportionate share of gross interstate revenues. Section 64.604(c)(4)(iii) directs carriers to calculate and file their contribution in accordance with a TRS Fund Worksheet.

> ... Contributions shall be calculated and filed in accordance with a "TRS Fund Worksheet", which will be prepared and published in the Federal Register. The worksheet sets forth information that must be provided by the contributor, the formula for computing the contribution, the manner of payment, and due dates for payments.

II. Filing Requirements and General Instructions.

A. Who must file.

All common carriers providing interstate telecommunications services within the United States or international telecommunications service between U.S. and foreign points must file this worksheet. For this purpose, the United States is defined as the conterminous United States, Alaska, Hawaii, American Samoa, Baker Island, Guam, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Island, Navassa Island, the Northern Mariana Islands, Palmyra, Puerto Rico, the U.S. Virgin Islands, and Wake Island.

For the purpose of calculating TRS contributions, interstate telecommunications service includes, but is not limited to the interstate portion of the following types of services: cellular telephone and paging, mobile radio, operator services, personal communications service (PCS), access (including Subscriber Line Charges), alternative access and special access, packet-switched, WATS, 800, 900, message telephone service (MTS), private line, telex, telegraph, video, satellite, international, intraLATA, and resale services. Note that all local exchange carriers provide interstate access services, and therefore must file.

Carriers need not file if they provide only intrastate service. Carriers need not file if they did not provide interstate service in calendar year 1994. However, all such carriers are encouraged to file because all carriers that file will be included in the FCC Carrier Locator. The Carrier Locator is a directory of telecommunications common carriers and is available to the public through the Commission's contract copier or on-line through the FCC-State Link computer bulletin board at (202)-418-0241. All carriers that are required to file or that voluntarily file must include a TRS fund contribution. The minimum contribution is $100.

Entities may not file summary reports for more than one carrier. Each legal entity that provides interstate telecommunications service must file separately. Entities that have distinct articles of incorporation are separate legal entities. All affiliates or subsidiaries should identify the ultimate controlling parent or entity in Block 1, Line (1c) -- Holding Company.

B. When and Where to File

The 1995 TRS contribution period will fund interstate TRS provided between May 1, 1995 and April 30, 1996. Monthly contributions for the 1995 TRS contribution period must be received by the 26th of each month for April 1995 through March 1996. A revised TRS Worksheet will be released for the 1996 TRS contribution period.

The legal name of the carrier and the TRS Company Code should be shown on all checks exactly as it appears on the completed TRS Fund Worksheet. TRS Company Codes can be obtained from the Carrier Locator, or by contacting the TRS Fund Administrator. **Do not mail the TRS worksheet or TRS contribution checks to the FCC.** Payments must be received by the FCC TRS Fund Administrator -- the National Exchange Carrier Association (NECA) -- no later than the dates indicated below. The filing schedule is as follows:

Mailing Address	Worksheet Due 4/26/95	Payments Due 4/26/95 through 3/26/96 *
NECA TRS P.O. Box 360090 Pittsburgh, PA 15251-6090		Check **
NECA FCC TRS Fund Administration 100 South Jefferson Rd. Whippany, NJ 07981 Telephone: 201-884-8173 Fax: 201-884-8469	Completed Worksheet	Photocopy of check **

* Carriers whose total 1995 TRS contribution is less than $1200 must pay the total amount to the FCC TRS Fund Administrator no later than April 26, 1995. Carriers whose total 1995 TRS contribution is $1200 or greater may elect to make twelve equal monthly payments with the first payment due to the FCC TRS Fund Administrator no later than April 26, 1995.

** Carriers are encouraged to contact the FCC TRS Fund Administrator to make arrangements for Electronic Funds Transfer.

C. Rounding of Numbers

All information provided in the worksheet, except the signature, should be neatly printed in ink or typed. Reported revenues in block 2, column (b) may be rounded to the nearest thousand dollars. Regardless of rounding, **all dollar amounts must be reported in whole dollars**. For example, $2,271,881.93 could be reported as

$2,271,882 or as $2,272,000, but could not be reported as $2272 thousand or $2.272 million. Please enter $0 if there was no revenue for the line for 1994.

Percentages reported in block 2, column (c) should be rounded to the nearest whole percent. For example, if the ratio of interstate to total revenue was .4269155, then the figure 43% should be reported. Percentages between 0% and 1% should be reported as 1%. Please enter 0% if there was no interstate revenue for the line for 1994.

Interstate revenues are calculated as total revenues in column (b) times the percentage shown in column (c). Calculated interstate revenues should be rounded to the nearest whole dollar and entered in column (e). Similarly, the total contribution (block 3, Line (18)) and amounts enclosed with the filing (block 3, Line (19)) should be rounded to the nearest whole dollar.

D. Compliance

Carriers failing to file the TRS Worksheet in a timely fashion are subject to the fines prescribed in Section 219(b) of the Communications Act of 1934 (the Act). Carriers filing false information are subject to fines or imprisonment as specified in Section 220(e) of the Act. Carriers failing to contribute in a timely fashion are subject to fines prescribed in Section 503(b) of the Act. In addition, Section 64.604(c)(4) of the Commission's Rules authorizes the FCC Fund Administrator to bill a carrier for reasonable costs, including legal fees, that are caused by improper filing of the worksheet or overdue TRS contributions.

III. Specific Instructions.

A. Block 1: Carrier Identification

Block 1 of the TRS Fund Worksheet requires identification information. Line (1a) requests the legal name of the carrier as it appears on articles of incorporation or other legal documents. Line (1b) provides a checkoff for the principal carrier activity. Please check the category that best describes the carrier.

LEC	Local Exchange Carrier -- provider of franchised local exchange service.

Cellular	Cellular telephone company.
Mobile	Any provider of mobile services, such as a radio telephone and **paging** service. This category does not include cellular or PCS.
OSP	Operator Service Providers -- are companies other than LECs that provide services to customers needing assistance of an operator such as to complete away from home calls, or calls using alternate billing arrangements. These companies typically employ operators as well as credit and cash card technologies to complete calls.
IXC	Interexchange Carrier.
CAP	Competitive Access Provider -- competes with local exchange carriers to provide services that link customers with interexchange facilities, local exchange networks, or other customers.
Pay Telephone	Provides customers access to telephone networks through pay telephone equipment, special teleconference rooms, etc.
PCS	Provider of Personal Communications Services
Reseller	Leases underlying transmission facilities for purposes of providing interexchange service.
Other	Check other if none of the above categories describes the carrier.

Line (1c) requests the name of the holding company or controlling entity, if any. All affiliates should have the same name for Line (1c). Line (1d) requests the primary carrier identification code (CIC) used by the carrier for the provision of interexchange services. All carriers that purchase feature group B or feature group D access services have one or more CICs. CICs are administered by the North American Numbering Plan Administration, which can be reached at 201-740-3129.

Line (2) requests the principal name under which the company conducts carrier activities. This would typically be the name that appears on customer bills, or the name used when service representatives answer customer inquiries. For example, American Telephone and Telegraph, Inc. might show AT&T. Line (3) requests the complete mailing address of the corporate headquarters. Line (4) requests a telephone number that can be used for customer inquiries. Information provided in Block 1 will be published in the Industry Analysis Division Carrier Locator.

B. Block 2: Carrier revenue for calendar year 1994

1. Column (b)

Provide gross revenues for all telecommunications services for Calendar 1994. Gross revenues include revenues from regulated, detariffed, and nonregulated telecommunications services. Where two carriers have merged during the year, the successor company should report total revenues for the year for both the predecessor and successor operations. [However, the two carriers would continue to report separately if each maintained separate corporate identities and continued to operate.] Gross revenues should not include non telecommunications services, such as the lease of customer premises equipment. Gross revenues consist of total revenues billed to customers with no allowances for uncollectibles. Billed revenues may be distinct from booked revenues. NECA pool companies should report the actual gross billed revenues (CABS Revenues) reported to the NECA pool and not settlement revenues received from the pool. For international services, gross revenues consist of gross revenues billed by U.S. carriers with no allowances for settlement payments. Gross revenues should also include any surcharges on communications services that are billed to the customer and either retained by the carrier or remitted to a non-government third party under contract. Gross revenues should exclude taxes and any surcharges that are not recorded as revenue but which instead are remitted to government bodies. Carrier revenue data for Calendar 1994 should be taken from the latest available company official records as of April 1995.

Report carrier revenues using the categories shown in column (a) of Block 2. Carriers required to use the Uniform System of Accounts (USOA) prescribed in Part 32 of the Commission's rules should base their response on their USOA account data. Other carriers should divide gross revenues based on the following descriptions. Do not use categories 8 or 14 for revenues that logically should be placed in other categories.

Line (5) -- Local exchange service -- should include the basic local service revenues of local exchange carriers except for local private line revenue, access revenues, and revenues from providing mobile or cellular services to the public. Line (5) should include Account 5001 -- basic area revenue; Account 5002 -- Optional extended area revenue; Account 5003 -- Cellular mobile revenue (revenue to the local exchange carrier for messages between a cellular customer and another station within the mobile service area); Account 5050 -- Customer premises revenue; Account 5060 -- Other local exchange revenue; and, Account 5069 -- Other local exchange revenue settlements. Line (5) should also include amounts in Account 5004 -- Other mobile services revenue -- that were derived from connecting with mobile service carriers.

Line (5) should not include Account 5010 -- pay telephone revenues. Such revenues should be included in Line (11) -- Operator service and pay telephone revenues. In addition, Line (5) should not include revenues from the Universal Service Fund and Lifeline Assistance Revenues (reimbursement for the waived portion of subscriber line charges). Such revenues should be included in Line (9) -- Interstate access revenues.

Line (6) -- Local private line service -- should include revenues from providing local services that involve dedicated circuits, private switching arrangements and/or predefined transmission paths. Line (6) should include amounts recorded in Account 5040 -- Local private line revenue.

Line (7) -- Mobile radio, cellular, paging and PCS -- should include revenues from the provision of mobile radio, cellular, paging and personal communications services to the public. Line (7) should also include amounts in Account 5004 -- Other mobile services revenue -- that were derived from providing service directly to the public.

Line (8) -- Alternative access & other -- should include all other local service revenues, including revenues for competitive access providers. Line (8) should include Account 5200 -- Miscellaneous revenue.

Long distance revenues include intrastate, interstate, and international long distance services. Divide long distance revenues between access service, operator service, other switched service, long distance private line services, and all other long distance services.

Line (9) -- Interstate access -- should include revenues in Account 5081 -- End User revenue; Account 5082 -- Switched access revenue; and, Account 5083 -- Special access revenue. In addition, Line (9) should include revenues from the Universal Service Fund and Lifeline Assistance Revenues (reimbursement for the waived portion of subscriber line charges). Only carriers collecting revenues pursuant to interstate access tariffs filed with the FCC should be reporting non-zero amounts on Line (9).

Line (10) -- Intrastate access -- should include revenues in Account 5084 -- State access revenue. Only carriers collecting revenues pursuant to intrastate access tariffs should be reporting data in Line (10).

Line (11) -- Operator service and Pay Telephone -- should include all calling card or credit card calls, person to person calls, and calls with alternative billing arrangements such as third number billing and collect calls. In addition, Line (11) should also include all pay telephone revenue, including all revenue in Account 5010. Operator service revenues should include all toll traffic from coin, public and semi-public, accommodation and prison telephones.

Line (12) -- Non-operator switched toll service -- should include amounts from Account 5100 -- Long distance message revenue -- except for amounts reported in Line (11). Line (12) includes WATS, 800, 900, "WATS like" and similar switched services.

Line (13) -- Long distance private line service -- should include revenue from dedicated circuits, private switching arrangements, and/or predefined transmission paths, extending beyond the basic service area. This category should include the resale of special access services. Line (13) should include Account 5120 -- Long distance private network revenue.

Line (14) -- All other long distance -- should include all other revenues from providing long distance communications services. Line (14) should include Account 5160 -- Other long distance revenue.

Total the figures in column (b) for Line (5) through Line (14) and enter this amount in Line (15b). This should represent the total communications revenues for the company.

2. Column (c) and Column (d)

For each entry in Line (5) through Line (14), estimate the percentage of the amounts reported in column (b) that are for interstate and/or international service, and enter this percentage in Column (c). Interstate revenues include all revenues received for calls that do not originate and terminate in the same state. For example, if a cellular carrier collects a fixed amount of revenue per minute of traffic, and 10% of minutes are interstate, then interstate revenues would include 10% of the per minute revenues.

Wherever possible, carriers should calculate the percentage of total revenues that are interstate by using information from their books of accounts and other internal data reporting systems. Carriers who cannot calculate a percentage by using information from their books of accounts and other internal data reporting systems, may elect to rely on a special study to estimate the percentages. **Place a check mark in Column (d) if the percentage shown in column (c) was based on a special study -- e.g. not based on a direct calculation from revenue amounts taken from the carrier's books of account.**

3. Column (e)

Multiply the gross revenues reported in column (b) by the interstate percentages reported in column (c), putting the results in column (e). The sum of the figures in column (e), Lines (5) through (14), should be entered in Line (15e).

C. Block 3: Calculation of Contribution

Use block 3 in the worksheet to calculate the TRS contribution for the period April 1995 through March 1996. Total interstate revenues from Line (15e) should be copied to Line (16). This amount must be multiplied by the Contribution Rate shown in Line (17), with the result entered in Line (18). The contribution rate is 0.00023 for the 1995 filing year.

If the result of the calculation is less than $100, then the total contribution for the year is $100. If the total contribution is less than $1,200, then the carrier should remit the total contribution with the worksheet. If the total liability is equal to or greater than $1,200, then the carrier may elect to make 12 equal monthly payments. The monthly contribution should be calculated as the amount in Line (18) divided

by 12.0, rounded to the nearest whole dollar. Enter the amount of the April 26, 1995 fund contribution in Line (19). If the carrier elects to make monthly contributions, the eleven additional monthly contributions must be received by the 26th of succeeding months, May 1995 through March 1996.

Section II - B above provides directions for mailing the completed TRS Fund Worksheet and checks for amounts due to the FCC Fund Administrator. Carriers who check the box in Line (19) will receive monthly payment reminders. These reminders will be mailed to the address shown in Line (25b). Contact the NECA, the TRS Fund Administrator to make other arrangements. Failure to receive a reminder notice will not justify late payment.

D. Block 4: Certification.

An officer of the fund contributor must examine the data provided in the TRS Fund Worksheet and certify that the information provided therein is accurate. In addition, the fund contributor should provide the name of a contact person who can provide clarifications, if necessary, and who could serve as the first point of contact in the event that either the FCC or the FCC Fund Administrator should choose to audit information provided by the company.

Line (25b) should contain the address of the contact person. The 1996 TRS Fund Worksheet will be sent to this address unless other arrangements are made with the TRS Fund Administrator.

Line (26) provides a check off to show whether the worksheet is the original filing for 1995, or whether the worksheet is a revised 1995 filing. A Carrier must file a revised worksheet if it discovers an error in the data that it reports. Carriers generally close their books for financial purposes by April. Carriers should not report routine out of period adjustments to revenue data unless such adjustments would affect a reported amount by more than 10%. Carriers should not file a revised Form 431 to reflect mergers, acquisitions, or sale of operating units. In the event that a carrier that filed a Form 431 no longer exists, the successor company to the carrier's assets or operations is responsible to continue making payments for the funding period.

IV. Reminders.

- Each affiliate or subsidiary must file separately. Each affiliate or subsidiary should show the same holding company name on Line (1c).

- Provide data for all lines that apply. Show a zero for all items where the carrier had no revenue for calendar 1994.

- Only LECs should be reporting revenue on Line (5).

- Only carriers with access tariffs should be reporting access revenues on Line (9) and Line (10).

- All pay telephone, credit card, debit card, and operator assisted revenue should be included on Line (11).

- Check the special study box for each line where the percentage of interstate revenues cannot be directly calculated from revenue amounts taken from the carrier's books of account.

- Include the legal name of the carrier -- as shown on Line (1a) -- on all TRS fund checks. Also include the TRS company code on checks. The TRS company code is assigned by NECA, the TRS Fund Administrator.

1995 TRS Fund Worksheet

(Please read instructions before completing) Estimated Average Burden Hours Per Response: 2 nours

Block 1: Carrier Identification TRS Company Code supplied by NECA ▸

1a Legal Name of Carrier	▸
1b Principal Communications Business (check only one) ☐LEC ☐Cellular ☐Mobile ☐OSP ☐IXC ☐CAP ☐Pay Telephone ☐Reseller ☐Other (explain) ☐PCS	
1c Holding Company	▸
1d Principal CIC code used for interexchange service	▸
2 Principal Business Name for Carrier	▸
3 Complete Mailing Address of Carrier Corporate Headquarters	▸
4 Telephone # for Customer Inquiries	▸ ( ) –

Block 2: Carrier Revenue Data for Calendar Year 1994 Note: Please report whole dollars without further rounding

(a)	Gross Revenues (b)	% interstate (c)	Special study (d)	Interstate Revenues (e) = (b) x (c)
Local Services				
5 Local exchange service	$	%		$
6 Local private line service	$	%		$
7 Mobile radio, cellular, paging & PCS	$	%		$
8 Alternative access & other	$	%		$
Long Distance				
9 Interstate access	$	100 %		$
10 Intrastate access	$	0 %		$ 0
11 Operator service & Pay Telephone	$	%		$
12 Non–operator switched toll service	$	%		$
13 Long distance private line service	$	%		$
14 All other long distance	$	%		$
15 Total lines 5 through 14	$			$

Block 3: Calculation of Contribution Note: Please report whole dollars without further rounding.

16 Interstate Revenues from Line 15e	$
17 Contribution Rate:	x 0.00023
18 Total CONTRIBUTION for April 1995 through March 1996: line 16 x line 17 [The minimum contribution is $100]	$
19 Contribution to be paid this month: (Enter the amount from line 18 if it is less than $1200. Otherwise, the contributor may divide the amount on line 18 by 12.0 to calculate equal monthly contributions.) **Check here for monthly billing reminders** ▸ ☐	$

Block 4: CERTIFICATION

I certify that I am an officer of the carrier named above, that I have examined the foregoing report and that to the best of my knowledge, information and belief, all statements of fact contained in this worksheet are true and that said worksheet is an accurate statement of the affairs of the above named carrier for the period January 1, 1994 through December 31, 1994.

20 Printed Name of Officer	▸
21 Position with carrier	▸
22 Signature	▸
23 Date	▸
24 Contact Person	▸
25a Telephone Number of Contact Person	▸ ( ) –
25b Complete Mailing Address of Contact: (Filing information and the 1996 TRS Fund Worksheet will be sent to this address.)	▸
26 This filing is: ☐Original filing for 1995 ☐Revised filing for 1995	

Mail checks to: NECA TRS P.O. Box 360090 Pittsburgh, PA 15251–6090 For additional information call NECA 201–884–8173
Mail worksheet and photocopy of checks to: NECA – FCC TRS Fund Administration 100 South Jefferson Rd. Whippany, NJ 07981

PERSONS MAKING WILLFUL FALSE STATEMENTS IN THE WORKSHEET CAN BE PUNISHED BY FINE OR IMPRISONMENT UNDER THE COMMUNICATIONS ACT, 47 U.S.C. 220(e)

FCC 431
January 1995

Appendix B: Calculation of TRS contribution factor

(DOLLAR AMOUNTS SHOWN IN MILLIONS)

	1993 Interstate Revenues 1/	Growth over Prior Year 1/	Projected 1994 Interstate Revenues
1 Local exchange, mobile, alternative access and other local	$1,754	0.085	$1,903
2 Access service	$23,012	0.062	$24,439
3 Switched, private line, and all other toll	$49,595	0.033	$51,232
4 Funding Base			$77,574
5 1995 Projected TRS outlays 2/			$24.844
6 Margin for safety			10.0%
7 Total Requirement (5) * (1 + (6))			$27.328
8 1994 carryover 2/			$10.111
9 Net 1995 Funding Requirement (7) – (8)			$17.217
10 Contribution Factor (9) / (4)			0.00023

1/ Telecommunications Industry Revenue: TRS Fund Worksheet Data, Industry Analysis Division, December 1994.

2/ Interstate TRS Fund Size Estimate, National Exchange Carrier Association, September 30, 1994

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

41264

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

DA 94-31
January 7, 1994

PROVIDING CALL-BY-CALL PRIORITIES OVER THE PUBLIC SWITCHED NETWORK

COMMENT DATE: February 15, 1994
REPLY DATE: March 1, 1994

The Office of the Manager of the National Communications System (OMNCS) has filed a letter requesting that the Commission issue an opinion regarding whether common carriers may provide call-by-call priority service for connecting emergency calls over the public switched network. OMNCS states that these priorities would be used for National Security and Emergency Preparedness (NS/EP) purposes prior to implementation of the President's war emergency powers under Section 706 of the Communications Act. The OMNCS states that its request is submitted on behalf of a number of common carriers who are interested in providing call-by-call priority for NS/EP related emergency calls. The letter also states that call-by-call priorities would be used only in emergency conditions and that current technology is capable of automatically identifying authorized users.

Copies of the OMNCS request letter, and comments when filed, may be inspected and copied at the Commission's Domestic Facilities Division Reference Room, Room 6220, 2025 M St., N.W., Washington, D.C. on Monday through Thursday from 8:30 a.m. to 3:00 p.m. (closed 12:30 - 1:30). Copies are also available from ITS, Inc., Room 246, 1919 M St., N.W., Washington, D.C. (202)857-3800. **Comments regarding the OMNCS letter request may be filed on or before February 15, 1994. Reply comments are due by March 1, 1994.** Comments should be sent to Olga Madruga-Forti, Chief, Domestic Services Branch, Common Carrier Bureau, Federal Communications Commission, 2025 M St., N.W., Room 6008, Washington, D.C. 20554. For further information, contact Herbert Neumann at (202)634-1373.

- FCC -

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

42492

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

DA 94-305

April 6, 1994

PRIVATE RADIO BUREAU SEEKS COMMENTS ON DANIEL R. GOODMAN'S, AND ROBERT CHAN'S REQUESTS FOR RULE WAIVERS TO EXTEND THE CONSTRUCTION AND LOADING DEADLINES APPLICABLE TO CERTAIN CONVENTIONAL SMR LICENSES

Daniel R. Goodman, Court-appointed Receiver (Receiver) for Metropolitan Communications Corp., Nationwide Digital Data Corp., Columbia Communications Services Corp., and Stephens Sinclair Ltd., seeks waiver of the Commission's Rules on behalf of approximately 4000 conventional-SMR licensees ("Consumers") that were allegedly defrauded by these Receivership companies. Dr. Robert Chan seeks similar relief for the five conventional SMR licenses he acquired via two of the Receivership companies.

The Receiver requests waiver of 47 C.F.R. § 90.633 to extend the eight-month construction and operation deadline applicable to the licenses held by the Consumers. The Consumers obtained their licenses via the Receivership companies' offerings and sales of investments in SMR licenses, applications, and filing services. The Receiver pleads that, according to the Federal Trade Commission's (FTC's) Complaint filed in U.S. District Court on January 11, 1994, the Receivership companies allegedly defrauded and mislead the Consumers as to the FCC's Rules. As a result, the Consumers obtained approximately 4000 conventional SMR licenses, which are now on the verge of cancelling automatically because the stations will not be constructed within eight months from the grant date, as required by Section 90.633.

The Consumers paid $7000 for each license they obtained via the Receivership companies and, according to the Receiver, could lose an aggregate sum of approximately $28 million if these licenses cancel. If the Commission grants these licensees a new eight-month period to construct, operate, and load their stations, the Receiver plans to facilitate transactions whereby stations first would be constructed and managed by existing SMR operators and then assigned. Each individual licensee may decide whether to enter any transaction presented by the Receiver.

Noting the FTC actions against the Receivership companies, Dr. Chan states that the Receivership companies he dealt with do not have the capability to construct stations in time for him to meet Section 90.633. Dr. Chan therefore requests a one-year extension for each of his five licenses, stating that he has now taken over all of the business and engineering activities for his stations in an attempt to facilitate construction and operation.

The Receiver tendered a $105 filing fee; Dr. Chan did not tender a filing fee. By requesting public comments on the instant requests, we clarify that the Commission is not ruling on the adequacy of the filing fees tendered.

The Private Radio Bureau solicits comments on all aspects of these two proposals. Comments should be filed on or before May 13, 1994. Reply comments should be filed on or before May 27, 1994. Comments and reply comments should be addressed to: Rules Branch, Land Mobile and Microwave Division, Private Radio Bureau, Room 5202, STOP 1700A1, Federal Communications Commission, Washington, DC 20554.

Copies of Dr. Chan's, and the Receiver's filings may be obtained from the Commission's duplicating contractor, International Transcription Service, Inc. (ITS), 2100 M Street, N.W., Suite 140, (202) 857-3800. A copy is also available for public inspection in Room 5202, 2025 M Street, N.W., Washington, D.C. 20554.

For further information contact the Rules Branch at (202) 634-2443.

- FCC -

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

42586

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

DA 94-327

April 12, 1994

Initiation of Direct Broadcast Satellite Service -
Effect on 12 GHz Terrestrial Point-to-Point Licensees
In the Private Operational Fixed Radio Service

In 1982, the Commission authorized the Direct Broadcast Satellite (DBS) service on a primary basis in the 12.2-12.7 GHz (12 GHz) band. See Report and Order, 47 Fed. Reg. 31555 (1982). The following year, the Commission adopted rules for the reaccommodation of existing terrestrial 12 GHz fixed microwave users in this same band. See First Report and Order, 48 Fed. Reg. 50722 (1983). As part of this reaccommodation, the Commission provided a five-year transition period before terrestrial licensees became secondary to DBS service. This five-year transition period ended on September 9, 1988. During this transition period, existing terrestrial users had the opportunity to relocate to other radio spectrum for which the Commission made specific provisions. Reaccommodation of existing 12 GHz users was deemed necessary by the Commission because of the likelihood of interference that terrestrial use would cause to DBS service if both were operating in the same geographic area.

During the past several months, a satellite for providing DBS service has been launched, reached the appropriate orbit, and has been tested. It appears that DBS service will be initiated within the next several months. Because DBS service will be provided on a nationwide basis and because there are over 200 terrestrial point-to-point licensees with over 1000 links remaining in the 12 GHz Private Operational Fixed Radio Service band, the Commission is concerned that interference problems may arise. This public notice is to remind 12 GHz terrestrial licensees that their operations may cause interference to DBS service. Terrestrial authorizations for the 12 GHz band are conditioned on a secondary basis to DBS service. Therefore, in the event that DBS service experiences interference from terrestrial point-to-point operations, it is the sole responsibility of terrestrial licensees to eliminate such interference immediately. To eliminate interference, it may be necessary for a terrestrial licensee to cease its operations immediately. Failure to cure harmful interference could result

in Commission enforcement action, including the imposition of any appropriate sanctions.

In view of the imminent arrival of DBS service, terrestrial 12 GHz licensees should again consider relocating their operations to other available frequency bands or alternative facilities. Existing licensees who need to continue their secondary operations in this band must take the necessary steps to prevent harmful interference to DBS reception. Licensees with operating authority for terrestrial systems in the 12 GHz band who no longer need such authority should vacate the band by submitting their licenses for cancellation or modification as appropriate.

For further information on this matter, contact the Consumer Assistance Office in Gettysburg, PA at 717-337-1212.

--FCC--

PUBLIC NOTICE

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1919 M STREET N.W.
WASHINGTON, D.C. 20554

44671

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

DA 94-978

September 8, 1994

ANNOUNCEMENT OF ANNUAL PUBLIC SAFETY MEETING FOR WASHINGTON, D.C. METROPOLITAN AREA

The purpose of this Public Notice is to announce the annual meeting of the Washington, D.C. Metropolitan Area Public Safety Review Committee.

DATE/TIME: October 18, 1994/1 P.M.

LOCATION: Seneca State Park
11950 Clopper Road
Gaithersburg, MD 20878

For additional information contact:

Howard S. Redman, Jr.
Secretary, Region 20 Public Safety Plan Review Committee
Carroll County Emergency Center Manager
1345 Washington Road
Westminster, MD 21157

PHONE: (410) 848-1488
FAX: (410) 848-3794

Questions regarding this Public Notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497.

--FCC--

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
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42587

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

DA 94-329

April 12, 1994

COMMENT SOUGHT ON REQUESTS TO WAIVE SECTION 90.603(C) TO PERMIT WIRELINE COMMON CARRIERS TO HOLD SMR LICENSES

The Commission seeks comment on six requests for waiver of Section 90.603(c), 47 C.F.R. § 90.603(c), of the Commission's rules, which prohibits wireline telephone common carriers from holding Specialized Mobile Radio (SMR) base station licenses. Specifically, these requests are: (1) Southwestern Bell Corporation (SBC) Request for Permanent Waiver; (2) Bell Atlantic Enterprises International, Inc. (Bell Atlantic) Request for Rule Waiver; (3) US West Paging, Inc. (USWP) Request for Permanent Waiver; (4) RAM Mobile Data USA Limited (RMD) Request for Transfer of Control and Rule Waiver; (5) Cass Cable TV, Inc. (Cass Cable) Request for Rule Waiver; and (6) American Paging, Inc. (API) Request for Rule Waiver.

The SBC, Bell Atlantic and USWP waiver requests stem from a 1992 Order that had terminated all conditional waivers of Section 90.603(c) that had been previously granted, but gave recipients of those waiver grants an opportunity to rejustify their waivers. See Order in PR Docket No. 86-3, 7 FCC Rcd 6879 (1992). By the terms of the 1992 Order, SBC, Bell Atlantic, and USWP continue to hold SMR interests pending the resolution of their waiver rejustification requests.

SBC, Bell Atlantic and USWP maintain that a waiver is justified because the regulatory concerns underlying the wireline restriction are no longer justified. They further allege that a waiver is warranted because continued operation of their SMR systems would serve the public interest. In addition, Bell Atlantic states that a waiver is justified because its SMR systems serve markets outside of its parent's wireline areas. At a minimum, SBC requests the Commission to continue its waiver until the wireline prohibition is reexamined.

In addition, there are three other requests filed by RMD, Cass Cable and API. RMD and API each allege that a waiver is warranted because their innovative new service offerings would

serve the public interest and are consistent with Commission policy. API further states that a waiver is justified because it will not be operating in any area where its parent holds wireline interests and will not be interconnecting with any parent-owned wireline. Cass Cable maintains that the concerns which prompted the Commission to restrict wireline ownership of SMR licenses are no longer operable or, in any case, do not apply to them. Cass Cable also agreed, if the Commission so requires, to forego SMR service in areas where its affiliate provides wireline service.

We solicit comments on all aspects of the waiver requests filed by SBC, Bell Atlantic, USWP, RMD, Cass Cable, and API. Comments should be filed on or before May 20, 1994. Reply comments should be filed on or before June 3, 1994. Comments and reply comments should be addressed to: Rules Branch, Land Mobile and Microwave Division, Private Radio Bureau, Room 5202, STP 1700A1, Federal Communications Commission, Washington, DC 20554. By requesting comments on the instant requests, we clarify that the Commission is not ruling on the adequacy of the filing fees tendered.

Copies of the requests may be obtained from the Commission's duplicating contractor, International Transcription Service, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, DC 20037, (202) 857-3800. Copies are also available for public inspection during regular business hours in Room 5202, 2025 M Street, N.W., Washington, DC 20554.

For further information contact Kathleen Ham or Sue McNeil of the Rules Branch at (202) 632-7125.

- FCC -

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
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WASHINGTON, D.C. 20554

43760

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

DA 94-748

July 5, 1994

PUBLIC SAFETY REGION 9
APPLICATIONS WINDOW ANNOUNCED

The Florida Region Committee, which is responsible for planning spectrum usage in the State of Florida in accordance with the Federal Communications Commission's Report and Order in General Docket 87-112, announces a filing window for submittal of radio channel allotment requests and license applications for radio frequencies in the 821-824/866-869 MHz bands.

Submittals are required only from agencies which:

1. need a new (first-time) allotment of radio channels, or

2. need an expansion (or other modification) of an existing allotment, or

3. are applying for FCC licensure of channels designated as "pooled".

Channel allotments are listed in Table IV of the Florida Region Plan as amended by Amendment #8.

The filing window period opened on June 1, 1994 and will close at 5:00 PM on September 23, 1994. No applications will be accepted prior to the opening or after the closing of the filing window.

Interested parties should write or call the Florida Region Committee Chairman for additional information or for copies of the Plan as follows:

Mark Pallans, Manager
Communications Projects
Metro-Dade County
5680 S.W. 87th Avenue
Miami, FL 33173

(305) 596-8941

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497.

- FCC -

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

44166

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

DA 94-838

RELEASED: August 3, 1994

QUESTION POOLS RELEASED FOR RADIOTELEGRAPH OPERATOR CERTIFICATE EXAMINATIONS

Tne FCC today released the question pools for Commercial Radiotelegraph Operator written examination Elements 5 and 6. To obtain a Third Class Radiotelegraph Operator's Certificate, an applicant must pass Written Elements 1 and 5, as well as Telegraphy Elements 1 and 2. To obtain a Second Class Radiotelegraph Operator's Certificate, an applicant must pass Written Elements 1, 5 and 6, as well as Telegraphy Elements 1 and 2. To obtain a First Class Radiotelegraph Operator's Certificate, an applicant must pass Written Elements 1, 5 and 6, as well as Telegraphy Elements 3 and 4.

Copies of released question pools are available through the Commission's duplicating contractor, International Transcription Services, Inc., 2100 M Street, N.W., Washington, DC 20037 (202) 857-3800. Copies are not available from the FCC. A printed copy of each released element is available for viewing during business hours in the Special Services Division, Rm. 5322, 2025 M Street NW, Washington, DC. (202) 632-7197, and in the Public Reference Room, Licensing Division, 1270 Fairfield Road, Gettysburg, PA (717) 337-1212.

Commercial Operator License Examination Managers must use questions from these question pools when preparing the question sets they administer to examinees. Each pool contains at least five times the number of questions that are asked on one question set. The minimum passing score for Element 5 is 38 correct answers on a 50 question set. The minimum passing score for Element 6 is 75 correct answers on a 100 question set.

All question pools have been released. The Commission will periodically revise each question pool as needed.

For further information, call J. Joy Alford at (202) 632-4964.

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

44334

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

DA 94-876

August 12, 1994

STATE PETITIONS TO RETAIN AUTHORITY OVER INTRASTATE MOBILE SERVICE RATES

The following petitions have been filed by states seeking to retain authority over intrastate mobile service rates. The full text of these documents is available for viewing and copying in Room 239, 1919 M Street, N.W., Washington, D.C. or may be purchased from the Commission's copy contractor ITS, Inc. (202) 857-3800.[1] Comments on the petitions must be filed within 30 days of the date of public notice of the petition in the Federal Register. *See* 47 C.F.R. § 1.4 (b)(1). Replies are due 15 days after the expiration of the filing period for comments. All comments and replies should reference the specific file number assigned to the state petition in issue and should be filed with the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554 .[2]

Petition of Public Utilities Commission, State of Hawaii, for Authority to Extend Its Rate Regulation of Commercial Mobile Radio Services in the State of Hawaii, PR File No. 94-SP1

Petition to Extend State Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services, filed by the Arizona Corporation Commission, PR File No. 94-SP2

Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates (accompanied by Request for Proprietary Treatment of Documents Used in Support of Petition to Retain Regulatory Authority Over Intrastate Cellular Service Rates), PR File No. 94-SP3

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[1] Pending a determination on its request for confidential treatment, material submitted by the State of California under seal will not be made available. A redacted version, however, will be available for viewing and copying.

[2] Some state petitions were erroneously labeled "GN Docket No. 93-252." All parties should use the state-specific file numbers listed in the text in the future.

Petition of the Connecticut Department of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut (filed August 9, 1994), PR File No. 94-SP4

Petition on Behalf of the Louisiana Public Service Commission for Authority to Retain Existing Jurisdiction over Commercial Mobile Radio Services Offered Within the State of Louisiana, PR File No. 94-SP5

Petition to Extend Rate Regulation Filed by the New York State Public Service Commission, PR File No. 94-SP6

Statement of the Public Utilities Commission of Ohio's Intention to Preserve Its Right for Future Rate and Market Entry Regulation of Commercial Mobile Radio Services, PR File No. 94-SP7

State Petition for Authority to Maintain Current Regulation of Rates and Market Entry (Sect.20.12) filed by the Public Service Commission of Wyoming, PR File No. 94-SP8

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1919 M STREET N.W.
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News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

DA 94-1017

September 20, 1994

PUBLIC SAFETY REGION 8
APPLICATIONS WINDOW ANNOUNCED

The Tri-State Radio Planning Committee (Region 8), which is responsible for planning spectrum usage in the New York metropolitan area in accordance with the Federal Communications Commission's Report and Order in General Docket 87-112, announces a filing window for submittal of radio channel allotment requests and license applications for radio frequencies in the 821-824/866-869 MHz bands.

The filing window period will open at 0001 hours on November 1, 1994 and will close at 2400 hours on November 30, 1994. No applications will be accepted prior to the opening or after the closing of the filing window.

The evaluation of applications will be done by the Region 8 Committee. Each application will be rated and scored for completeness of application, system need, coverage, loading, funding, and other criteria. Applications receiving a high ranking may not necessarily receive a frequency assignment as certain areas in Region 8 are currently depleted of 800 MHz spectrum.

For further information and complete details, please contact the appropriate local frequency advisor for your state:

Connecticut:
Robert DiBella
Bureau of Statewide Emergency Telecommunications
20 Grand Street
Hartford, CT 06106 Telephone (203) 566-3243

New Jersey:
Norman Coltri
New Jersey State Police
P. O. Box 7068
7068 River Road
West Trenton, NJ 06828-0068 Telephone (609) 882-2000 x2517

New York:
Vincent Stile
Suffolk County Police Department
Communications Technical Section
30 Yaphank Avenue
Yaphank, NY 11980 Telephone (516) 852-6431

Questions regarding this Public Notice should be directed to Betty Woolford, Private Radio Bureau (202) 632-6497.

--FCC--

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

44825

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

DA-94-1023

September 19, 1994

Commission Applies "Permit But Disclose" Ex Parte Rules to
Cincinnati Bell Telephone Petition for Waiver
Cellular Eligibility Rules (Section 24.204)
Comment Dates Set

The Commission has before it petitions for reconsideration of the *Memorandum Opinion and Order* in Gen. Docket 90-314, FCC 94-144, released June 13, 1994 (Broadband PCS Reconsideration), which raise issues concerning the eligibility restrictions imposed on cellular licensees that seek to participate in the auction of broadband PCS spectrum. For *ex parte* purposes, the further reconsideration is a non-restricted proceeding under Section 1.1206(b)(1) of the Commission's Rules, 47 C.F.R. § 1.1206(b)(1). In conjunction with review of these petitions, and consistent with the Commission's *ex parte* rules providing for disclosure of permissible presentations, the staff has been engaged in discussions with certain parties for the purpose of obtaining information and exploring possible resolutions of the issues raised by the petitions. Summaries of presentations made by the parties in connection with these discussions are contained in the docket file.

On July 21, 1994, Cincinnati Bell Telephone Company (CBT) petitioned for waiver of Section 24.204 of the Commission's Rules, which restricts entities holding attributable cellular interests from obtaining more than 10 MHz of broadband PCS spectrum in the area served by the cellular interest. CBT asserts that the restriction is unreasonable as applied to it, on the ground that its attributable interest is passive. CBT added in a supplement to its petition filed September 16, 1994 that it has undertaken litigation to dissolve the cellular partnership and divest that interest. As yet no parties have commented on CBT's petition for waiver and supplement.

The CBT petition for waiver involves common elements of the eligibility restrictions upon which petitions for reconsideration are pending in Gen. Docket No. 90-314, which have already occasioned opposition filings as well as *ex parte* presentations.

We believe the public interest in resolving the issues raised by the petitions for reconsideration expeditiously, as well as parties' interest in ensuring that decisions on any common issues are based upon a record available to all interested parties, will best be served by making the CBT waiver proceeding subject to the "permit but disclose" *ex parte* rules applicable to nonrestricted proceedings even after any oppositions are filed. [1] These rules permit interested parties to make *ex parte* presentations to Commission decisionmakers but require that the presentations be disclosed in the record of the relevant proceeding. Written *ex parte* communications must be filed with the Secretary while oral *ex parte* communications must be summarized in writing and also filed with the Secretary (with a copy to the person or persons with whom the communication was made). All *ex parte* filings should reference the appropriate file number or numbers.

Consistent with this Public Notice, all parties making *ex parte* presentations on the reconsideration or CBT waiver proceeding shall file any written *ex parte* presentations and summaries of any oral *ex parte* presentations in both Gen. Docket No. 90-314, and the CBT waiver proceeding.

Copies of the CBT petition for waiver and any subsequently filed documents in both of these proceedings, including *ex parte* materials, may be obtained from International Transcription Services, Inc., Suite 140, 2100 M Street, N.W., Washington, DC 20037, (202) 837-3800 or at the Mobile Services Division reference facility, Room 628, 1919 M St. N.W., Washington, DC.

For further information, contact Stan Wiggins at (202) 418-1300 regarding the CBT waiver proceeding, or Michael Wack at (202) 418-1322 regarding Gen. Docket No. 90-314.

Comments on the CBT petition must be filed no later than September 26, 1994, and replies must be filed no later than October 3, 1994.

By the Chief, Private Radio Bureau.

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[1] Section 1.1200(a) of the Commission's Rules, 47 C.F.R. § 1.1200(a), permits the Commission to adopt modified or more stringent *ex parte* procedures in particular proceedings if the public interest so requires.

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

50352

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

DA 94-1187

October 25, 1994

PRIVATE RADIO BUREAU ANNOUNCES DEFERRAL OF ACCEPTANCE OF MODIFICATION APPLICATIONS FOR NON-NATIONWIDE 220 MHZ STATIONS PENDING FURTHER RULE MAKING

On August 19, 1994, the Private Radio Bureau released a Public Notice (DA 94-902) extending the deadline for construction of non-nationwide 220 MHz stations to April 4, 1995 and announcing that it would accept certain applications for modification of non-nationwide 220 MHz station locations. The Public Notice indicated that the freeze on modification applications would be lifted 30 days after publication of the Public Notice in the Federal Register. Following the release of the Public Notice, the Commission released its Third Report and Order in GN Docket No. 93-252 regarding technical, operational, and licensing rules for Commercial Mobile Radio Services. Third Report and Order, GN-Docket 93-252, FCC 94-212 (adopted August 9, 1994; released September 23, 1994). In that proceeding, the Commission reaffirmed the extension of the construction deadline to April 4, 1995 and announced that it intends to initiate a rule making in the near future to address implementation of a possible new licensing scheme for the 220 MHz service. See Third Report and Order, para. 127. The Commission also stated that other licensing issues, such as the status of facilities being constructed or operating under STAs and procedures for filing modification applications, would be addressed as part of this upcoming proceeeding. Id., paras. 345, 362.

As a result of the Commission's decision, the Private Radio Bureau has concluded that it will not implement the previously announced timetable for acceptance of modification applications, but will instead defer adoption of new modification procedures pending consideration of such procedures as part of the upcoming rule making. Therefore, the Bureau will not begin accepting non-nationwide 220 MHz modification applications at this time. Non-nationwide 220 MHz licensees who have received Special Temporary Authority (STA) to construct and operate at locations other than those specified in their authorizations may continue to operate under STA provided that they complete construction by the April 4, 1995 deadline. Operation under STA, however, is expressly conditioned on the Commission granting a modification application at such time as new modification applicaion procedures are established.

For further information contact Marty Liebman or David Furth, Private Radio Bureau, Rules Branch, at (202) 634-2443, or the Consumer Assistance Branch at (717) 337-1212.

- FCC -

Federal Communications Commission
Washington, D.C. 20554

FCC 95-9

January 5, 1995

OFFICE OF
THE SECRETARY

Released: January 5, 1995

Mr. Preston R. Padden
Fox Broadcasting Company
5151 Wisconsin Ave., N.W.
Washington, D.C. 20036

Re: Fox Television Stations, Inc.; Application for Renewal of License for Stations WNYW, New York, New York (File No. BRCT-940201KZ)

Dear Mr. Padden:

This letter is in response to your letter to the Commission's general counsel dated January 3, 1995. We write to address certain allegations in your letter concerning the Commission staff's handling of the investigation in the above-referenced license renewal proceeding. Your letter makes several arguments directed to the merits of the proceeding, which will not be addressed herein. We await the Mass Media Bureau's recommendation in this case and will address the parties' arguments on the merits at that time. We respond solely to address the allegations in your letter that the current investigation is "inappropriate" and that the investigation is being conducted without "fundamental fairness and objectivity."

The Commission is committed to ensuring the integrity of its decisionmaking and maintaining a high level of public confidence in the fairness of its proceedings. Having reviewed the current procedures, the Commission is confident that this proceeding is being handled by the Commission's staff in a fair, objective and impartial manner, consistent with the handling of all Commission investigations. We are confident that the actions of and procedures employed by the Commission staff have not been designed to, and will not in fact, prejudice the outcome of this proceeding or any particular party. We fully support the staff's current plans for completing the investigation.

This letter was adopted by the Commission on January 5, 1995.

BY DIRECTION OF THE COMMISSION

William F. Caton
Acting Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 94-286
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of	)	
the Cable Television Consumer	)	
Protection and Competition	)	MM Docket No. 92-266
Act of 1992: Rate Regulation	)	
	)	
Implementation of Sections of	)	
the Cable Television Consumer	)	
Protection and Competition	)	MM Docket No. 93-215
Act of 1992: Rate Regulation	)	

SIXTH ORDER ON RECONSIDERATION, FIFTH REPORT AND ORDER, AND SEVENTH NOTICE OF PROPOSED RULEMAKING

Adopted: November 10, 1994 ; Released: November 18, 1994

By the Commission: Commissioner Quello issuing a statement; Commissioner Barrett dissenting and issuing a statement; Commissioner Ness issuing a statement; Commissioner Chong dissenting in part and issuing a statement.

Comment Date: January 13, 1995
Reply Comment Date: February 13, 1995

Table of Contents

		Paragraphs:
I.	Introduction	1
II.	Executive Summary	2
III.	New Product Tiers	16

IV. A La Carte Package Offerings 38

V. Adjustments to Capped Rates for Addition, Deletion, and Substitution of Channels on Cable Programming Services Tiers 54

1. Going Forward Price Cap Structure 66

2. Per Channel Adjustment Factor 72

3. Operator's Cap 76

4. License Fee Reserve 80

5. Programming Cost Increase Mark-Up 83

6. Deletion And Substitution of Channels 84

7. Headend Upgrades for Small Systems 87

8. Systems with More than 100 Channels 95

9. Term of the Revised Channel Addition Rules 98

VI. Negative Option Billing 99

VII. Affiliate Transactions 120

VIII. Seventh Notice of Proposed Rulemaking 132

IX. Regulatory Flexibility Act Analysis 135

X. Paperwork Reduction Act 147

XI. Procedural Provisions 148

XII. Ordering Clauses 150

Appendices

I. Introduction[1*]

1. In 1992, Congress passed the Cable Television Consumer Protection and Competition Act[1] ("1992 Cable Act") in large part to ensure that where competition for cable services is absent, cable rates will be regulated to protect the interests of consumers.[2] Since the passage of the 1992 Cable Act, the Commission has adopted and implemented comprehensive rules governing cable rates.[3] In February 1994, we adopted a further notice of proposed rulemaking to determine whether we should amend our rules to provide additional incentives for adding new programming services.[4] In this Report and Order we modify our rules in order to provide cable operators with additional incentives to expand their facilities and services in a way that both ensures that cable rates are reasonable and expands the opportunities for cable programmers to reach viewers.[2*] These incentives will: (1) allow cable operators to offer new product tiers ("NPTs") to be priced as operators elect, provided certain limited conditions are met; (2) permit cable operators to add new channels at reasonable prices to existing cable programming services tiers ("CPSTs");[3*] and (3) create an additional option pursuant to which small cable operators may add channels to CPSTs. In addition, we determine that a la carte packages are CPSTs and therefore subject to rate regulation. We also confirm that cable operators do not have to obtain the affirmative consent of subscribers before making rate adjustments so long as the changes are permitted under our rules and the fundamental nature of the affected tier is unaltered. Finally, we decide not to adopt our proposal modifying restrictions on transactions between cable operators and their affiliates; instead, we retain our existing cable affiliate transaction rule.

[1*] Substantive notes are indicated by a number with an asterisk and are placed at the bottom of the page. Notes containing only citations are indicated by separately sequenced numbers and are placed as endnotes.

[2*] In this order, we modify our rules in light of comments filed in response to our *Fifth Notice of Proposed Rulemaking* in this docket. *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking* ("*Second Recon. Order*" or "*Fourth Report*" or "*Fifth Notice*") MM Docket 92-266, FCC 94-28, 59 FR 1743 (1994). We also reconsider, in response to the petitions for reconsideration and on our own motion, certain decisions made in the *Fourth Report and Order* in this docket. The Commission retains jurisdiction to modify on its own motion an order from which reconsideration is sought. *See* 47 U.S.C. § 405; 47 C.F.R. § 1.108; *see also Central Florida Enterprises v. FCC*, 598 F. 2d 37, 48 n.51 (D.C. Cir. 1978).

[3*] In this Report and Order, unless indicated otherwise, we use "CPSTs" to mean cable programming service tiers that are rate regulated under Section 76.922 of our rules. Although new product tiers are CPSTs within the meaning of the Communications Act of 1934, as amended by the 1992 Cable Act (the "Communications Act") § 623(l)(2), 47 U.S.C. § 543(l)(2), in this Report and Order, they are separately referred to as new product tiers or NPTs.

II. Executive Summary

2. The 1992 Cable Act seeks to address problems that arise from the market power cable operators have over the distribution of video programming in virtually all geographic markets.[4*] That market power may allow the operator to limit access for programmers and to pay less than competitive prices for programming. The cable operator's market power also may allow the operator to restrict the supply of programming to consumers and to charge higher than competitive prices for programming.[5] Thus, the Commission is concerned with the possible exercise of market power by operators in two markets: (1) the purchase of programming from programmers and (2) the sale of services to subscribers.

3. Under the 1992 Cable Act, we must reconcile and accomplish the goals of ensuring that cable rates are reasonable, while expanding opportunities for cable programmers to reach viewers.[6] These goals must be pursued with regard to current unused channel capacity and with regard to capacity that may be added by operators in the future. We are convinced that our current rules, which permit operators to increase rates to reflect costs associated with adding channels and to obtain a 7.5% mark-up on new programming costs, by themselves do not create a sufficient incentive for most operators to provide subscribers with additional channels from either unused or new capacity. The Commission recognizes that under current industry practices, new programming typically must be offered in packages or bundles if it is to obtain sufficiently high subscription rates to be commercially successful. Therefore, this new programming must be added to a cable operator's basic service tier ("BST"), to a CPST or offered in a new package. However, in developing additional incentives for adding channels to a cable operator's offerings, we are mindful that consumers are entitled to reasonable prices for basic and cable programming services, set pursuant to the 1992 Cable Act.

4. New Product Tiers. To accommodate the introduction of new packages of channels, we will permit cable operators to offer a new type of CPST called an NPT. Operators are permitted to price these NPTs as they elect. The Commission has determined that NPTs and current CPSTs will compete with each other, ensuring that the price for NPTs will not be unreasonable. As explained more fully in this Report and Order, the conditions

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[4*] *See* 1992 Cable Act § 2(a)(2). In 1990, there were fewer than 50 cases in which a second cable operator (an "overbuilder") entered a local market in direct competition with the incumbent cable operator over a significant portion of the incumbent's territory. *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, First Report ("Competition Report")*, CS Docket No. 94-48, FCC 94-235 (adopted Sept. 19, 1994, released Sept. 28, 1994) at para. 55. The Commission is aware of relatively few overbuilds or overbuild proposals since that time. *Id.* at para. 60. Moreover, providers of video programming using technologies other than cable, such as satellite providers, generally have not yet reached market penetration levels necessary to constitute "effective competition" with cable operators as defined under the Act. *Id.* at para. 201.

for offering NPTs are: (1) cable operators must continue to offer their current BSTs and CPSTs at prices set by regulations we established previously; (2) cable operators may not weaken the status of current tiers as reasonably priced competitive alternatives to NPTs by removing channels from existing tiers and offering them on NPTs; (3) cable operators must continue to offer BSTs and current CPSTs in such a manner that subscribers should reasonably be aware that they may choose whether or not to subscribe to the NPT; and (4) a subscriber may not be charged for an NPT unless the cable operator has obtained the subscriber's affirmative consent. In addition, operators generally may not require consumers to subscribe to a CPST as a condition for subscribing to an NPT. Further, operators may not require subscription to an NPT as a condition for subscribing to a CPST.

5. Under these rules, operators may offer the same channel simultaneously on both a CPST and an NPT. This option gives the operator greater flexibility to market NPTs so that they are more attractive to subscribers. Furthermore, operators may place new programming services[59] on existing CPSTs and, at any time, move them to an NPT. In addition, operators may add a channel to an NPT that was previously on a BST or CPST, if the channel was dropped from the BST or CPST before September 30, 1994. For channels that were offered on a BST or CPST on September 30, 1994, operators may not drop any of those channels and move them to an NPT unless they wait a minimum of two years from the time the channel was dropped.

6. In short, our rules governing NPTs ensure that subscribers may choose to obtain additional programming at reasonable rates. In addition, our rules are clear and simple. Cable operators are not required to complete any forms or obtain any regulatory approval to offer NPTs, and they may set the price for the tier at the level they elect.

7. A La Carte Package Offerings. Under the 1992 Cable Act, video programming offered on a per channel or per program (a la carte) basis is not subject to rate regulation. The Commission has determined that some cable operators have evaded rate regulation by purporting to offer channels a la carte, when in fact the individual offerings were not a realistic service offering. This determination has lead the Commission to conclude, contrary to prior decisions, that a la carte packages are CPSTs within the meaning of Section 3(l)(2) of the 1992 Cable Act. As such, the packages are subject to rate regulations. Operators are free, however, to create packages of a la carte channels under our new rules governing NPTs. A la carte packages available on April 1, 1993 remain grandfathered.

8. Rate Adjustments for Channels Added to BSTs and CPSTs. The Commission's existing rate regulation rules permit operators to increase rates by a per channel amount when channels are added to BSTs and CPSTs, with the per channel amount decreasing as the number of channels on a system increases. These rules also permit operators to pass through

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[59] For purposes of this Report and Order, a cable operator's "new programming services" are programming services that were not offered on its cable system prior to October 1, 1994.

to subscribers the costs of obtaining programming plus a 7.5% mark-up on new programming costs. The comments we have received in response to the *Fifth Notice* provide evidence that these existing rules may not provide sufficient incentives for systems with more than 12 current channels to add new channels (especially new channels with low license fees) to CPSTs. Because appropriate incentives for adding new channels serves the statutory goal of "promot[ing] the availability to the public of a diversity of views and information,"[7] we conclude that the rate regulations ought to be supplemented to incorporate a flat fee mark-up for adding new channels to a CPST. The revised regulations may be used to adjust rates after December 31, 1994, for channel additions occurring after May 14, 1994.

9. Operators electing to use the new rules will be allowed to take a per channel mark-up of up to 20 cents for each channel added to CPSTs. This 20 cents per channel adjustment represents the Commission's best estimate of the average amount by which operators in a competitive environment would adjust rates for the addition of a new channel, exclusive of programming costs. Operators may make rate adjustments under this rule at any time during the three-year period beginning on January 1, 1995. They may not make per channel adjustments to monthly rates totalling more than $1.20 per subscriber over the first two years of the three-year period for new channels added on CPSTs or by more than $1.40 over the full three-year period (the "Operator's Cap"). Operators may make the 20 cents per channel adjustment in the third year only for channels added in that year. Operators electing to use the per channel adjustment in the new rules may not take the 7.5% mark-up on programming cost increases for channels added after May 14, 1994.

10. The Operator's Cap is based on our observations of cable industry behavior prior to the 1992 Cable Act, adjusted for the lack of effective competition prevalent in the industry, so as to replicate a competitive market. The Commission believes the Operator's Cap will provide an adequate incentive to operators to add new services to CPSTs, while protecting subscriber interests by keeping overall regulated rates reasonable.

11. Operators may use any portion of the Operator's Cap to recover license fees associated with adding new channels to CPSTs. In addition, operators may recover an additional amount of not more than 30 cents per subscriber per month for license fees associated with adding new channels (the "License Fee Reserve") during the first and second years the Operator's Cap is in effect. The License Fee Reserve is necessary because, without one, operators might have incentives to add no-cost or low-cost channels to CPSTs. We believe our rate regulations should not distort market incentives for cable operators to add channels that subscribers are most likely to desire, whether high-cost or low-cost, and the License Fee Reserve seeks to accomplish this goal. In the third year, license fees will not be subject to special rules, but will be subject to our general rate rules.

12. Small System Relief. Our revised rules allow independent small systems and small systems owned by small multiple system operators to pass through to subscribers the costs of new headend equipment for adding not more than seven new channels to CPSTs over the next three years. The amount the qualifying small system may recover is limited to the

actual cost of the headend equipment necessary to add a channel, not to exceed $5,000 per channel, plus the channel's licensing fee, if any. The cost of headend equipment must be amortized over the useful life of the equipment and operators will be allowed an 11.25% return on the undepreciated investment. Alternatively, small systems may use the current or revised channel addition rules that are available to all operators.

13. Negative Option Billing. We affirm that an operator's decision to add, delete or replace channels on any tier is outside the negative option billing prohibition of the 1992 Cable Act -- so that the cable operator does not have to obtain each subscriber's affirmative consent before making a change -- if the channel changes do not alter the fundamental nature of the tier. Specifically, we determine that the affirmative consent requirements of the 1992 Cable Act[8] do not apply: (1) when a cable operator raises its rates as a result of passing through external costs or inflation adjustments under the Commission's rules or (2) when a cable operator changes its rates as a result of the addition, deletion or substitution of channels pursuant to the Commission's "going forward" regulations, unless there has been a change in the fundamental nature of a tier. We determine that the addition of a relatively few channels to a tier as is permitted by our revised channel addition rules will not, except in the case of an unusually small tier, change the fundamental nature of a tier, and accordingly does not require affirmative consent. We also determine that state or local consumer protection laws that conflict with or undermine the rate regulation rules established pursuant to Section 3 of the 1992 Cable Act may not be enforced.

14. Affiliate Transactions. We decline to adopt a proposal to limit the application of a prevailing company price as a measure of a reasonable price for an affiliate transaction. The proposal would have allowed the use of prevailing company prices only for affiliate transactions in which the affiliate sells at least 75% of its output to nonaffiliates.[9] The record demonstrates that many programming services that have achieved widespread distribution among cable operators would be unable to establish a prevailing company price under the proposed rule because of their affiliations with multiple system operators. We believe it would not be in the public interest to bar such programmers from using their prevailing price because there is no basis in this record to conclude that cable operators are paying excessive amounts for assets or services from those unregulated affiliates. We will, therefore, retain our existing rule, which provides that an operator may value an asset or service at the prevailing company price if the affiliated provider has provided the same kind of asset or service to a substantial number of third parties.

15. 7.5% Markup on Increases in License Fees. We have decided not to allow operators using the per channel adjustment of up to 20 cents under our new rules to take the 7.5% mark-up on programming costs or cost increases for such channels. We also solicit comment on (1) whether operators electing to use the per channel adjustment under our new rules should be allowed to take the 7.5% mark-up on programming cost increases for channels added before May 15, 1994, and (2) whether operators electing to use the current going forward rules should be permitted to pass-through the 7.5% mark-up on new programming cost increases after the initial mark-up of programming costs of new channels.

III. New Product Tiers

A. Background

16. In developing our cable rate regulations, we are guided by the policy goals set forth by Congress in enacting the 1992 Cable Act.[10] These goals are:

(1) promote the availability to the public of a diversity of views and information through cable television and other video distribution media;
(2) rely on the marketplace, to the maximum extent feasible, to achieve that availability;
(3) ensure that cable operators, where economically justified, continue to expand their capacity and the programs offered over their systems;
(4) where cable television systems are not subject to effective competition, ensure that consumer interests are protected in the receipt of cable service; and
(5) ensure that cable television operators do not have undue market power vis-a-vis video programmers and consumers.[11]

17. The 1992 Cable Act requires us to ensure that CPST rates are not unreasonable upon the receipt of a specific complaint.[12] The Act requires the Commission to establish criteria for determining whether a rate is unreasonable after considering a number of factors, such as the rates of similar systems, the rates charged by cable operators that face competition, and the operator's costs and revenues.[13] The 1992 Cable Act also permits the Commission to consider other relevant factors for determining what constitutes unreasonable rates for CPSTs.[14]

18. In the *Report and Order and Further Notice of Proposed Rulemaking* in MM Docket No. 92-266 (*"Rate Order"*), we determined that, to comply with the statute, our standards for identifying unreasonable CPST rates must reflect a reasonable balancing of the statutory factors.[15] In considering the factors, we decided to give primary weight to the rates of systems subject to effective competition.[16] Accordingly, the benchmark formula we developed for the purpose of establishing initial rates for regulated cable services was based on a comparison of rates for cable systems in competitive markets with a random sample of systems that did not face effective competition.[17] Using econometric techniques, we established a "competitive differential" by estimating the difference between competitive and noncompetitive rates. We also designed the benchmark formula to comply with the other statutory factors for determining whether CPST rates are unreasonable.[18] In addition, the statutory factors were given consideration in the cost-of-service approach which we established as an alternative to the benchmark approach.[19]

19. We also decided that a "tier neutral" approach was preferable to establishing different rate regulation schemes for BSTs and CPSTs.[20] We adopted the same benchmark

approach for purposes of resolving complaints regarding CPST rates as for determining whether basic rates are reasonable, and we applied the benchmark in the same manner to determine the initial permitted per channel rate for a CPST.[21] For the purpose of adjudicating an initial complaint, we determined that a per channel rate for a CPST at or below the benchmark at the time the complaint is filed is reasonable and will be a permitted rate.[22] For a system with rates at the time of regulation that are above the benchmark, the permitted rate level for the system is the system's September 30, 1992 per channel rate, reduced by a competitive differential of 17%, mitigated by annual inflation increases.[23] Under our transition rules, the requirement that rates be set in accordance with this general rule does not apply immediately to (1) small operators, (2) systems whose March 31, 1994 rates are below the benchmark, or (3) systems whose March 31, 1994 rates are above the benchmark but whose permitted rates are at or below the benchmark.[24]

20. We have also sought to adopt rules that promote "a diversity of views and information" and ensure that "cable operators continue to expand . . . programs offered over their systems."[25] Under these rules, cable operators may increase rates for BSTs and CPSTs to reflect inflation, increases in external costs, and the addition of new channels.[26] The current formula for channel additions permits operators to collect a sliding per channel adjustment for adding new programming channels to CPSTs[27] and to recover all programming expenses associated with adding channels, plus a 7.5% mark-up on new programming expenses.[28]

B. Comments

21. A number of programmers have expressed the view that the cable industry's ability to create new programming networks that can benefit consumers depends on operators' being able to offer these new services in packages of programming.[29] They assert that if new services must be offered on a stand-alone basis, the costs of marketing will increase the retail costs to consumers.[30] These programmers urge the Commission to provide increased incentives to cable operators to offer such packages of new programming services.[31] Other commenters suggested that a marketplace system is preferable to regulation in certain programming and tiering decisions.[32] In addition, as reflected in the record, many *ex parte* comments supported the adoption of rules allowing operators to establish tiers of new services priced at market rates.[33]

C. Discussion

22. We are concerned, based on the comments filed by operators and programmers, that our current rules may not provide sufficient incentives for operators to expand capacity and provide new services to consumers. Accordingly, we are establishing a new category of

CPSTs -- an NPT[6*] -- that will provide additional incentives for operators to provide new services to consumers because operators will be permitted to price these tiers as they choose. Our new rules also will help programmers by encouraging operators to add new attractive programming to NPTs in order to induce customers to subscribe to the NPTs.[7*]

23. Competition for NPTs. NPTs are, by definition, "cable programming services" under the 1992 Cable Act, because NPTs are composed of video programming provided over cable systems that are not carried on the BST and are offered in a package rather than exclusively on a per channel or per program basis.[34] We therefore have a duty under the 1992 Cable Act to ensure that NPTs are not unreasonably priced.[8*]

24. We find that, so long as the conditions set forth below are met, the rates for NPTs will not be unreasonable. The conditions set forth below will ensure that subscribers may choose to subscribe to BSTs, NPTs, or CPSTs or combinations of those tiers and, that as a result, NPTs will face competition from BSTs and CPSTs. We believe this for four reasons. First, all cable subscribers will continue to be able to purchase services on BSTs and CPSTs at reasonable rates set at either the benchmark or cost-of-service levels, with future rate increases limited by our rules. Second, the services provided on BSTs and CPSTs will be comparable to the services provided on NPTs, in that both types of tiers will provide programming packages that contain multiple channels of video programming services. Third, as explained below, operators offering NPTs will be required to preserve the fundamental nature of their BSTs and CPSTs as of September 30, 1994, so that cable operators that charge unreasonable rates for NPTs should attract few subscribers for their new offering. Fourth, because NPTs are likely to be composed primarily of channels not offered by the operator on September 30, 1994, operators will not have an established audience for NPTs when they are first introduced. Thus, market forces will ensure that operators will charge rates for NPTs that are low enough to attract new viewers.

25. Conditions for Offering NPTs. The principal reason for our belief that the rates charged for NPTs will not be unreasonable is that consumers retain the option to subscribe to BSTs and/or CPSTs regulated under the benchmark formula or pursuant to cost-of-service standards and therefore will not choose an NPT if the price is unreasonable. To ensure that BSTs and CPSTs continue to provide subscribers with a meaningful choice, our

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[6*] For purposes of the FCC Forms 1200 and 1210, channels that are on an operator's NPT will not be considered regulated channels.

[7*] Accordingly, we believe that this approach also will achieve the statutory goals of ensuring that "cable operators continue to expand . . . programs offered over their systems" and promoting "a diversity of views and information" by relying "on the marketplace, to the maximum extent feasible." 1992 Cable Act §§ 2(b)(1), (2).

[8*] We find that NPTs must be not unreasonably priced regardless of whether channels on NPTs are also offered on a per channel basis (*i.e.*, a la carte). *See* paras. 47,51, *infra*.

new rules establish the following conditions for operators offering NPTs.

26. First, operators offering NPTs are prohibited from making fundamental changes to what they offer on their BSTs and CPSTs on September 30, 1994.[9*] This requirement is necessary to ensure that cable subscribers continue to receive basically the same cable service they now receive at prices we have set pursuant to our rate regulations. This requirement, however, is not intended to freeze BSTs and CPSTs. Operators remain free to move channels from the existing tier to a single channel offering or drop channels entirely, so long as the aggregation of such changes does not constitute a fundamental change of their BSTs or CPSTs.

27. Second, operators may not drop channels from BSTs and CPSTs and move them to NPTs (including time-shifted, slightly altered or renamed versions of channels offered on other tiers), if the channels were offered on their BSTs or CPSTs on September 30, 1994. This will protect consumers by ensuring that operators electing to provide NPTs do not dilute the BSTs and CPSTs that are currently available to consumers. This will also help ensure that BSTs and CPSTs provide a competitive option to NPTs.

28. Third, BSTs and CPSTs must continue to be cognizable services. That is, the operator must continue to market its BSTs and CPSTs so that customers are reasonably aware of: (1) the availability of those tiers to the public; (2) the names of the channels available on those tiers; and (3) the price of the tiers. Within 30 days of the offering of an NPT, operators shall file with the Commission a copy of the new rate card that contains the following information on their BSTs, CPSTs, and NPTs: (1) the names of the programming services contained on each tier, and (2) the price of each tier. Operators also must file with the Commission copies of notifications that were sent to subscribers regarding the initial offering of NPTs. After this initial filing, cable operators must file updated rate cards and copies of customer notifications with the Commission within 30 days of rate or service changes affecting the NPT. This information will help the Commission ensure that operators are complying with our conditions for NPTs. No prior regulatory approval, however, is required to offer an NPT.

29. Furthermore, in accordance with the 1992 Cable Act's prohibition on negative option billing, an operator may not charge any subscriber for an NPT unless the subscriber has requested the NPT by name. Thus, a decision to subscribe to an NPT will be the product of affirmative consumer choice and reflect a decision to subscribe to the NPT in addition to, or in place of, other services. Moreover, fundamental changes to an NPT must be approved

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[9*] In our negative option billing regulation, we have provided that cable operators do not have to obtain the affirmative consent of subscribers before making changes "that do not result in the fundamental change in the nature of an existing service or tier of service." 47 C.F.R. § 76.981. We borrow from that regulation in concluding that cable operators offering NPTs must preserve the "fundamental nature" of their BSTs and CPSTs.

by subscribers in accordance with the negative option billing rules.[10*]

30. Operators may not require the subscription to any tier, other than a BST, as a condition for subscribing to an NPT. Further, operators may not require subscription to an NPT as a condition to subscribing to a CPST.[11*] We believe that restricting the ability of operators to link the purchase of NPTs and other CPSTs will maximize subscriber choice and foster competition between NPTs and CPSTs.

31. Apart from the foregoing limited, specific requirements, operators will have complete flexibility to offer programming services on an NPT. Thus, our NPT rules provide that operators may offer the same programming services on NPTs as are on one or more BSTs and CPSTs.[12*] This will permit operators to place high value channels on NPTs without constraining subscriber choice.[13*]

32. Operators may add any channel to an NPT that was previously on a BST or CPST if the channel was dropped from the BST or CPST before September 30, 1994. If a channel was offered on a system on a BST or CPST on September 30, 1994, however, the channel may not be moved to an NPT unless the operator waits at least two years from the date the channel is dropped from the BST or CPST. However, operators may offer new channels (i.e., channels first offered on a system after September 30, 1994) on CPSTs before moving them to NPTs, subject to the conditions outlined in this Report and Order. The

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[10*] We clarify below that channel changes involving relatively few channels generally will not change the fundamental nature of a tier and thus will not implicate the negative option billing rule. *See* para. 110, *infra*. Thus, the affirmative consent requirement will not unduly restrict operators' ability to tailor offerings on tiers to meet operator or consumer needs.

[11*] These restrictions will not apply to cable operators that, prior to October 5, 2002, lack the capacity to offer BSTs and NPTs without also providing other intermediate tiers of service (1) by controlling subscriber access to CPST channels of service through addressable equipment electronically controlled from a central point or through the installation, noninstallation, or (2) removal of frequency filters at the premises of subscribers without other alteration in system configuration or design and without causing degradation in the technical quality of service provided. *See* 47 C.F.R. § 76.921.

[12*] Cable operators may not state or imply that any such channel is available only on an NPT.

[13*] A channel that occupied a BST or a CPST part-time may be offered full-time on an NPT, as long as it continues to be offered on the BST or CPST under substantially the same conditions as it was offered on September 30, 1994. If a channel occupies a BST or CPST full-time, however, and is subsequently reduced to part-time on the BST and CPST, that channel may not be offered on an NPT full-time.

flexibility to move new channels to NPTs will keep the prices for CPSTs from becoming unreasonable and will create additional capacity for new services on CPSTs. This capacity should help create opportunities for programmers to establish an audience for their new channels.[14*]

33. These rules will be easy to apply. In order to offer an NPT, a cable operator is not required to complete any forms or obtain the approval of any agency. Furthermore, operators will be permitted to price NPTs as they choose and should encounter no regulatory problems unless they attempt to weaken their existing tiers of service so that BSTs and CPSTs do not compete effectively with NPTs. Although these rules will be clear and easy to apply, they also will ensure that subscribers will not be charged unreasonable rates. In short, our rules governing NPTs promote the goals of ensuring that the rates are reasonable and expanding opportunities for cable programmers to reach viewers.

34. Statutory Authority. The 1992 Cable Act directed the Commission to establish "criteria ... for identifying, in individual cases, rates for cable programming services that are unreasonable."[35] In addition, Congress instructed us, "[i]n establishing the criteria for determining in individual cases whether rates for cable programming services are unreasonable," to "consider" six factors.[36] Those six factors include: (1) the rates of similar cable systems; (2) the rates of systems that face effective competition; (3) the history of rates for a system; (4) the system's rates for the BST and equipment; (5) the system's capital and operating costs; and (6) the system's advertising revenues. We were not, however, instructed to consider each factor in the course of evaluating a particular system's rates, but instead were instructed to consider the factors in the course of establishing criteria by which to determine whether rates for CPSTs are unreasonable.

35. We considered the six statutory factors in the course of establishing our rate regulations, and our rate rules accordingly incorporate our analysis of those factors. In brief, the benchmark approach by which most cable operators set their rates is based directly on the first two factors -- the rates of similar systems and the rates of systems that face effective competition. The cost-of-service alternative is based directly on the last three factors -- the rates, costs, and revenues of a system. In addition, both approaches indirectly reflect our consideration of each factor, because the various factors are interrelated.

36. Our conclusion that the rates at which cable operators choose to offer NPTs will not be unreasonable reflects our consideration of the statutory factors that the Commission must consider in establishing criteria for determining whether a rate for a CPST is unreasonable. As explained above, we believe that the rates charged for NPTs will be

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[14*] If after initially electing to offer an NPT, a cable operator decides that offering an NPT is no longer desirable, the cable operator is free to drop the tier upon proper notice to subscribers. An operator that drops an NPT may reestablish that tier at a later time by complying with the conditions outlined above.

constrained by the rates charged for BSTs and CPSTs. Our rate standards for BSTs and CPSTs were set directly by our analysis of the factors the 1992 Cable Act instructs us to consider. We believe that the rates charged for NPTs must be competitive with the rates charged for CPSTs or consumers will decline to subscribe to NPTs. Therefore, the rates charged for NPTs will reflect our analysis of the statutory factors because cable operators will have to offer NPTs at prices that are attractive in comparison to services subject to our benchmark or cost-of-service regulations.

37. Our NPT rules depart to a degree from the "tier neutral" approach we have applied previously. Our benchmark and cost-of-service approaches to setting rates have required cable operators to set rates for BSTs and CPSTs under the same standard -- and thus are tier neutral -- while our approach to NPTs treats those tiers differently from other CPSTs. We find that this approach is consistent with our interpretation of the statute. We do not construe the statute to require tier neutrality, but to permit a tier neutral approach. For the reasons we have explained above -- primarily the desirability of providing incentives to cable operators to provide new outlets for programming -- we believe that a departure from tier neutrality is warranted for NPTs. Allowing cable operators to set the rates for NPTs, rather than requiring NPT rates to be set under the rules set forth in 47 C.F.R. § 76.922, is consistent with our statutory duties because NPTs will compete with tiers offered at rates regulated pursuant to our benchmark or cost of service rules. Accordingly, our treatment of NPTs will both promote the availability of additional channels to subscribers and ensure reasonable rates.

IV. A La Carte Package Offerings

A. Background

38. Under the 1992 Cable Act, video programming offered on a per channel or per program (a la carte) basis is not subject to rate regulation.[37] In the April 1993 *Rate Order*, we held that we would not regulate packages of otherwise exempt per channel or per program services so long as: (1) the price for the combined package does not exceed the sum of the individual charges for each component of service, and (2) the cable operator continues to provide the component parts of the package to subscribers separately.[38] We stated that the second condition would be met only when the per channel offering provides subscribers with a realistic service choice.[39] We also stated that we would retain jurisdiction to review packages of a la carte channels to determine whether the attempted offering constituted an evasion of rate regulation.[40]

39. Given the limited type of packages of per channel services that were available at the time we adopted the *Rate Order*, we believed that market forces would likely ensure that the rates for these offerings would be reasonable.[41] However, following the adoption of the *Rate Order*, a number of operators restructured service offerings so that channels that would have been subject to regulation were removed from a regulated tier and offered on both an a la carte basis as well as on a package basis. In our *Second Recon. Order,* we expressed

concern that the restructuring in some instances (1) may not be consistent with the purposes of the 1992 Cable Act, (2) may not comply with our requirement that subscribers must have a realistic option to purchase channels on an a la carte basis and (3) may constitute prohibited evasions of rate regulation.[42]

40. In the *Second Recon. Order*, we concluded that the public interest will be served by generally permitting nonregulated treatment of collective offerings of a la carte channels, if the offering enhances consumer choice and does not constitute an evasion of rate regulation. We concluded that these objectives would be achieved if operators complied with the standards set forth in our initial rules.[43] However, in order to address our concerns that some packages established by operators in response to rate regulation were not consistent with the 1992 Cable Act and our regulations, and the fact that other offerings raising similar concerns could be initiated in the future, the *Second Recon. Order* provided 15 interpretive guidelines for determining whether an operator's collective offering of a la carte channels should be accorded regulated or unregulated treatment. We stated that the guidelines would enable operators to better determine which packages of a la carte channels would be considered an evasion of rate regulation rather than a realistic service offering, and also would help local authorities and the Commission to assess expeditiously the appropriate regulatory status of specific packages of a la carte channels. We stated that in evaluating particular packages we would consider whether consumers were being offered a greater variety of programming options and whether the price for those choices was increasing or decreasing from previous levels.[44]

41. We also determined that packages of a la carte channels offered prior to April 1, 1993 (the date we adopted the *Rate Order*) would be accorded unregulated treatment. This limited "grandfathering" of packages available on April 1, 1993 was intended to avoid elimination of discounts that were available to consumers and clearly were not offered to evade rate regulation.[45] Finally, our *Second Recon. Order* stated that we would monitor our treatment of packages of a la carte channels and that, if it appeared that such offerings were not adequately fulfilling the purposes of the 1992 Cable Act, we would promptly revisit the issue.[46] Previously, on November 17, 1993, the Mass Media Bureau issued 16 letters of inquiry to various cable operators, and on December 13, 1993, it issued another 35 letters of inquiry, most of which addressed the issue of removal and repackaging of channels. On February 22, 1994, the Cable Services Bureau issued 11 letters of inquiry to cable operators that, among other things, asked operators to justify a la carte offerings that may be inconsistent with the Commission's rate regulations.

B. Comments

42. We have received numerous comments with respect to a la carte issues. Most of the commenters requested greater clarification of the Commission's a la carte rules and guidelines.[47] These comments indicate that our a la carte rules are thought to be very unclear and that clarification is needed before most operators are willing to market new a la carte offerings. Cable programmers suggest that the existing uncertainty makes it difficult for new

services to gain exposure to viewers either on regulated tiers or in a la carte packages.[48]

43. One major area of concern of commenters is the ambiguity surrounding the number of channels that can be moved from regulated tiers to an a la carte tier under our 15-factor test. For example, NCTA requests guidelines on what would constitute "significant" versus "insignificant" migration of channels from a regulated tier to an a la carte package under the test set forth in the *Second Recon. Order*.[49] Another issue that generated numerous comments involved clarification of the extent to which an a la carte package could be discounted as compared to the aggregate price of its components before we would conclude that the individual channels in an a la carte package were not "realistically" available to subscribers.[50]

44. Commenters also made suggestions concerning the treatment of a la carte offerings that are found not to meet Commission guidelines. Viacom suggests that the Commission adopt guidelines under which operators who have initially launched a service on an a la carte basis may safely move the network back to a regulated tier, so called "reverse migration."[51] Discovery Communications favors the adoption of guidelines that allow for the movement of a la carte channels back to regulated tiers without the requirement of affirmative consent under the negative option billing rule and without incurring liability of any kind.[52] These comments are premised on the theory that cable operators should not be penalized for failing to satisfy our test for a la carte packages because it is unclear.

C. Discussion

45. The evidence we obtained in response to the letters of inquiry issued to cable operators offering a la carte packages and the comments we have received from cable operators convince us that we should reconsider our approach. It seems clear that some cable operators have evaded rate regulation by purporting to offer channels a la carte, when in fact the individual offerings were not a realistic service alternative. On the other hand, we must acknowledge that there is merit to the industry's claim that neither our original two-part test nor our interpretative guidelines provides a clear answer with respect to the permissibility of some a la carte packages that have been offered. Indeed, it is perhaps inevitable that our test would not be capable of precise application in many instances because it is not clear how various factors should be weighed and applied.

46. Our analysis leads us to conclude, contrary to our prior decisions, that a la carte packages are CPSTs within the meaning of Section 3(l)(2) of the 1992 Cable Act. Justice Frankfurter said: "Wisdom too often never comes, and so one ought not to reject it because it comes late."[53] In this case, we think that the conclusion that all packages are "cable programming services" is supported by the language of the statute, the legislative history, and

practical considerations as well.[15*]

47. Section 3(l)(2) defines CPSTs as "any video programming provided over a cable system, regardless of service tier, including installation or rental of equipment used for the receipt of such video programming, other than (A) video programming carried on the basic service tier, and (B) video programming offered on a per channel or per program basis." A package of channels, whether or not the channels also are offered a la carte, plainly is "video programming provided over a cable system," and hence is a "cable programming service." The package is not "video programming offered on a per channel or per program basis;" the individual channels are. Accordingly, it is apparent from the statutory language that a la carte packages are cable programming services, and we therefore have a duty under Section 3(c)(1) to establish "criteria . . . for identifying, in individual cases, rates for cable programming services that are unreasonable." We acknowledged as much in our original decision authorizing a la carte packages when we said that, by authorizing a la carte packages, we were declining to "interpret[] the statute in . . . a literal fashion."[54]

48. A conclusion that rate regulation does not apply at all to video programming packages if the channels are offered individually would fatally undermine the rate regulation rules Congress enacted. If a package of a la carte channels is not a CPST, any cable operator may avoid rate regulation simply by announcing the offering of channels on an a la carte basis even if very few subscribers would choose the a la carte offerings rather than the package. For example, Adelphia Cable in Dade County, Florida purported to remove its entire 32-channel cable programming services tier (which had been priced at $13.95) from rate regulation by offering the individual channels a la carte. However, in order to receive a single channel a la carte, Adelphia imposed a $6 equipment charge plus a per-channel charge. Only two-tenths of one per cent of Adelphia's customers subscribed to individual channels rather than the package. Congress could not have intended to allow cable operators to evade rate regulation through such an offering. That practical consideration confirms our conclusion that a package of channels is a "cable programming service" whether or not the channels are offered a la carte.

49. The conclusion that a package of a la carte channels is a CPST is further supported by the legislative history, which focused on the fact that bundled offerings of cable programming would be subject to rate regulation. The Senate Report stated that the definition of "cable programming service" and the provision requiring the Commission to regulate the rates for such service "demonstrate the Committee's belief that greater unbundling of offerings leads to more subscriber choice and greater competition among program services. Through unbundling, subscribers have greater assurance that they are choosing only those program services they wish to see and are not paying for programs they do not desire."[55] While the Committee said it had "no desire to regulate programming," it nevertheless concluded that,

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[15*] To the extent commenters urge us to allow unregulated treatment of a la carte packages, we reject that approach as inconsistent with our statutory interpretation.

when bundling was involved, rate regulation of programming was necessary: "[B]ecause cable operators bundle transmission, equipment and programming, it is impossible to contain a cable operator's market power without oversight of the bundled rate. The Committee has tried to make this oversight minimal by . . . not extending regulation to programs offered on a per channel or per program (unbundled) basis."[56]

50. Similarly, the House Report indicated that "the only cable services potentially not subject to the Commission's regulatory authority would be services traditionally offered on a stand-alone, per-channel basis (premium channels like HBO or Showtime) or other programming that cable operators choose to offer on a per-programming service [sic], per-channel or pay-per-view basis."[57] In light of that legislative history, we think it clear that Congress intended all collective offerings of channels to be subject to our regulatory authority, as the statutory language provides.

51. However, as we recognized in the *Rate Order*, there are sound policy reasons to treat as reasonable any price offered for a package of channels that traditionally have been offered on a per-channel basis. Indeed, we cannot envision circumstances in which any price of a collective offering such as the commonly offered "HBO/Showtime" package would be found to be unreasonable. For the future, our new rules authorizing "new product tiers" should provide cable operators with sufficient flexibility to offer such packages at whatever price they choose. Although cable operators may not remove channels from regulated tiers and offer them on NPTs, they are free to create packages of a la carte channels under our new rules governing NPTs. Moreover, as stated above, we previously "grandfathered" packages available on April 1, 1993. The difficult question concerns the treatment of a la carte packages created between April 1, 1993, and September 30, 1994. In some cases we think it is clear that the package at issue was not a permissible package under a fair reading of our test.[58] In other cases, however, it is not clear how our test should be applied to the package at issue. In those cases, we think it is fair, in light of the uncertainty created by our test, to allow cable operators to treat existing packages as NPTs even though it would not qualify under the rules we establish today, provided that such packages involve only a small number of migrated channels.[16*] We see little reason to require an operator to "reverse migrate" a package that was not clearly ineligible for unregulated treatment under our a la carte policy. We intend to address whether specific operator packages should be treated as NPTs in ruling on individual cases in the near future.[59]

52. In sum, our experience with a la carte packages leads us to conclude that we should not have departed from a plain reading of the statutory text in the first place. The Supreme Court's recent decision in *MCI v. AT&T* confirms our conclusion that we should adhere to statutory language.[60] In that case the Court invalidated our "permissive detariffing" policy, pursuant to which we declined to require some telephone companies to file tariffs even

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[16*] As noted above, competition between an NPT and a BST and/or CPST is the primary reason that we conclude rates for NPTs will not be unreasonable. *See* paras. 23-25, *supra*.

though Section 203(a) of the Communications Act states that "[e]very common carrier ... shall designate, file with the Commission, and print and keep open for public inspection" tariffs showing its rates. Just as Congress directed us to require telephone companies to file tariffs, Congress has directed us to ensure that rates for packages of cable channels are not unreasonable.

53. Moreover, our experience with a la carte packages replicates the Supreme Court's experience in a different area. In *O'Callahan v. Parker*[61] the Court departed from "the plain language of Clause 14" of Section 8 of Article I of the Constitution[62] and held that a court-martial could try a defendant only if his offense was "service connected." In *Relford v. Commandant, U.S. Disciplinary Barracks*, the Court established a multi-factor test to determine whether an offense was "service connected."[63] Sixteen years later, the Court concluded that the multi-factor test "has proved confusing and difficult for military courts to apply."[64] The Court therefore overruled *O'Callahan*, abandoned the multi-factor test, and returned to a plain reading of Clause 14, explaining that "[w]hen considered together with the doubtful foundations of *O'Callahan*, the confusion wrought by the decision leads us to conclude that we should read Clause 14 in accord with the plain meaning of its language."[65] Although we have had only a few months' experience with our multi-factor test -- rather than the 16 years -- we have taken a similar course with respect to a la carte packages.

V. Adjustments to Capped Rates for Addition, Deletion and Substitution of Channels on CPSTs

A. Background

54. Pursuant to Section 623 of Communications Act[66] the Commission adopted a comprehensive framework governing the rates for BSTs and CPSTs. Under this framework, once initial rates are set pursuant either to the benchmark[17*] or cost-of-service[67] approaches set forth in our earlier orders, rates are governed by a price cap designed to assure that rates for regulated cable services remain reasonable.[68] Under the cap, operators may adjust rates annually for inflation as measured by the gross national product price index ("GNP-PI")[69] and for certain categories of external costs.[18*]

[17*] *See* 47 C.F.R. 76.922(b). The benchmark approach is designed to produce rates for regulated cable services that approximate the rates of cable systems subject to effective competition as defined in the 1992 Cable Act. *See generally, See Report and Order and Further Notice of Proposed Rulemaking ("Rate Order")*, MM Docket No. 92-266, 8 FCC Rcd 5631, 58 FR 29736 (1993) at paras. 14-15; *See Second Recon. Order* at paras. 67-105.

[18*] *See* 47 C.F.R. § 76.922(d)(3). These external costs include the additional or new retransmission consent fees incurred after October 6, 1994, other programming cost increases (with certain limitations for program purchases from affiliates), taxes, franchise fees, and the

55. Our price cap rules were amended in March, 1994 to specify a "going forward" mechanism under which capped rates are adjusted for changes in the number of channels offered on BSTs and CPSTs. Under these provisions, operators first remove all external costs from the tier charge and then adjust the residual component of the tier charge by a specified per channel adjustment amount when the total number of regulated channels changes.[19*] The methodology for adjusting capped rates when channels are added or deleted from a regulated tier is set forth in detail in section 76.922(e) of our rules and in FCC Form 1210.[70]

56. In March, 1994, we also permitted operators to include a mark-up of 7.5% on new programming expense related to programming added on or after May 15, 1994.[20*] In setting the 7.5% mark-up, we noted that virtually no one had provided any material evidence on what, if anything, would be an appropriate mark-up on new programming costs. We chose 7.5% as a "cautious choice" for an initial permitted mark-up on new programming expense and stated that we would monitor the impact of this permitted mark-up to assure its fairness to cable operators and subscribers.[71] We also issued a further notice of proposed rulemaking to determine if any changes in our going forward methodology were warranted to permit the

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costs of other franchise requirements including the costs of any public, educational, or governmental access obligations that a franchising authority requires the cable operator to provide and Commission regulatory fees. *Id.; See also Fourth Order on Reconsideration* ("*Fourth Recon. Order*"), MM Docket No. 92-266, FCC 94-40, 59 FR 18064 (1994) at paras. 11-14; 47 C.F.R. § 76.924(i).

Under our rules, an operator seeking to adjust capped rates to reflect changes in its external costs and inflation determines the actual level of its external costs. External costs are then removed from the total charge for the affected service tier, leaving a "residual." The "residual" is adjusted for inflation on an annual basis, but no earlier than September 30th of each year (when the final GNP-PI figure through June 30 of that year is released) and no later than August 31st of the following year. *See Second Recon. Order* at para. 174. Rates may be adjusted quarterly for net changes in external costs. *See First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164 (1993) at para. 122.

[19*] *See Fourth Report* at paras. 247-48. The per channel adjustment amounts for systems with various numbers of channels appear as a table in our rules. *See* 47 C.F.R. § 76.922(e). The per channel adjustment declines from 52 cents for systems with seven or fewer regulated channels to ten cents with systems with 17 regulated channels to one cent for systems with more than 46 regulated channels. *Id.* The Technical Appendix to the *Fourth Report* describes how the per channel adjustment factors were calculated.

[20*] *See Fourth Report* at para. 246; 47 C.F.R. § 76.922(d)(3)(xi). Form 1210 allows the 7.5% mark-up on all programming cost increases occurring after March 31, 1994, no matter when the channel was first offered.

continued growth of programming services.[72]

B. Comments

57. Parties filing petitions for reconsideration and many commenters filing in response to the *Fifth Notice* ask the Commission to revise the existing going forward rules substantially.[73] Many criticize the existing per channel adjustment. Some argue that the current methodology for calculating per channel adjustments is flawed because it is based on the rates charged by systems of various sizes, rather than the costs or rate effects of adding a channel.[74] Operators also argue that the existing mechanism fails to provide sufficient incentives to add channels.[75] Others allege that the per channel adjustments are not sufficient to cover the costs of rebuilding systems.[76] Some programmers and networks also contend that the declining per channel adjustment methodology is inadequate.[77] USA Network proposes a per channel adjustment of no less than five cents per channel for each new channel added to a system, which, it says represents the cost to a 26-channel system of activating one channel.[78]

58. The Consumer Federation of America ("CFA") argues that our existing going forward rules provide operators with sufficient incentives to add new channels. CFA states that cable operators threaten to close off new and existing outlets for programming under existing rules in an attempt to use programmers as a means of putting pressure on the Commission to increase the rates cable operators may charge for channel additions.[79]

59. Most petitioners and commenters contend that the current 7.5% mark-up on new programming is an inadequate incentive for operators to add new programming services to regulated tiers.[80] Cable operators, programmers, and networks state that the percentage-based approach to the programming mark-up results in disincentives for operators to add low- or no-cost services to BSTs and CPSTs (noting that 7.5% of zero is zero).[81] The commenters state that the percentage-based approach is particularly problematic for new services because they generally are offered, at least initially, as low-cost or no-cost services. Similarly, long-term carriage of services having business plans that make them low- or no-cost is less attractive.[82] Some suggest that the percentage mark-up approach gives operators an incentive to replace low cost services with higher cost services and, accordingly, also encourages programmers to raise their licensing fees.[83] Public Interest Petitioners and others allege that because programming targeted to specific groups, such as minorities, is generally low- or no-cost programming, these groups are disproportionately harmed by the percentage mark-up methodology.[84] Others more generally state that the 7.5% mark-up fails to provide sufficient incentives.[85] They suggest that the 7.5% mark-up does not account for the costs of launching a new channel, including the foregone opportunity to devote the new channel to unregulated services.[86] Some argue that the current mark-up deters investment and stifles innovation in the industry.[87] Others suggest that the existing rules may cause operators to add no, or at most only a few new channels.[88] Some programmers, however, favor retention of the 7.5% markup.[89]

60. Most of the alternatives on going forward issues proposed by the industry involve a flat per channel charge. The National Cable Television Association ("NCTA") and Telecommunications, Inc. ("TCI") submitted economic studies to support a flat per channel adjustment of at least 25 to 30 cents.[90] Others propose a flat fee for new services and a percentage mark-up on increased costs for existing services,[91] or a flat fee adjusted for inflation.[92] Continental Cablevision, Inc. ("Continental") proposed setting the mark-up on new channels at a rate equal to the average mark-up that an operator was allowed per channel on existing regulated services.[93]

61. Some, including NCTA, propose a flat-fee mark-up subject to an annual cap. Cablevision Industries, Inc. ("CVI") supports a flat fee mark-up of 35 to 40 cents per channel, plus licensing fees with a $1.50 annual cap on the aggregate rate increases attributable to the per channel mark-up and license fees.[94] CVI adds that the cable operator, rather than the programmer, should be allowed to retain the vast majority of the rate increase associated with the addition of a new channel.[95] CVI argues that an annual cap encourages operators to choose new services wisely while minimizing the risk of adding services merely to justify higher rates.[96] CVI also would allow operators to accrue such increases for two years to accommodate upgrades and rebuilds.[97] The Cable Telecommunications Association ("CATA") agrees with the flat fee with an annual cap approach and suggests a mark-up of between 25 and 50 cents with a cap of an unspecified amount.[98] Others propose an annual cap applicable only to the mark-up and not the underlying license fee.[99] Others disagree with the adoption of an annual cap,[100] arguing that an annual cap discriminates against high cost services and thus, at a minimum, a cap should not be applicable to services such as regional news and sports.[101] The Commission also received comments suggesting that it should adopt separate going forward rules specifically applicable to small systems.[102]

62. In addition to the comments in this proceeding, in response to, and during the period contemplated by, the *Fifth Notice*, the Commission has received a number of other informal comments from representatives of operators, programmers, local franchising authorities and public interest groups discussing proposed revisions to the going forward rules. NATOA also argued against permitting programming additions to BSTs on the ground that to do so would force BST-only subscribers -- "who include many low-income and elderly subscribers and captive subscribers who could not otherwise receive over-the-air broadcast stations" -- to pay for programming they did not want.[103] NATOA urged the Commission to limit the ability of operators to take advantage of new permitted rate increases to add home-shopping revenues, advertising revenues and other compensation from certain programming services.[104] NATOA also expressed concern over license fee increases in years subsequent to those covered by any license fee cap, suggesting either limiting license fee increases to inflationary adjustments, requiring that new services be moved to a new tier or offered only a la carte at the end of the capped period or eliminating the rate increase made on the channel's addition.[105] Finally, NATOA urged the Commission not to permit channel additions to the BST so as to minimize the regulatory burden on local franchising authorities.[106]

63. The City of St. Louis, Missouri, argues that revisions to the current going forward rules will cause rate shock to consumers. They questioned whether operators need additional incentives above benchmark rates to add new channels and expressed concern over a perceived lack of protection against more shopping and advertising channels and double-recoveries by operators through revenues from programmers.[107] The Consumer Federation of America also expressed concern that a flat mark-up would encourage the addition of home shopping and low cost programming.[108] The St. Louis letter supports NATOA's arguments against encouraging channel additions to BSTs. The letter urges the extension of price caps in respect of programming costs for as long as a channel is on a BST/CPST or, in the alternative, that the new rules require the channel's removal on termination of the price cap restraints. Finally, the St. Louis Letter states the Commission should seek to ensure that the financial gain from additional channels goes to programmers rather than operators.[109]

C. Discussion

64. As noted, the Commission previously adopted a mechanism by which cable operators may adjust rates when adding channels to BSTs and CPSTs.[110] The Commission is supplementing its existing going forward rules by creating an alternative channel adjustment methodology. Cable operators adding channels to CPSTs under the new, supplemental rules may receive (1) a flat per channel mark-up, subject to a cap through December 31, 1997, and (2) recovery of programming costs, subject to a cap through December 31, 1996, and pursuant to our existing rules on permitted programming costs through December 31, 1997, modified to remove the 7.5% mark-up. In so doing, the Commission seeks to permit operators to provide new services on CPSTs, while assuring that rates for CPSTs are not unreasonable.[111] Our new rules will benefit consumers by assuring that operators will have incentives to add new services, but without the unreasonable rate increases that some operators implemented prior to regulation. Our revised going forward rules will form an integral part of our comprehensive regulatory framework governing cable service rates.

65. Operators may adjust rates for CPSTs pursuant to our new going forward rules beginning January 1, 1995, the effective date of the new rules, for channel changes, if any, made to these tiers on or after May 15, 1994, the effective date of our existing going forward rules. Operators adding channels to CPSTs on and after May 15, 1994, may use either the new rules or the existing rules for adjusting rates. Thus, under the regulatory requirements we establish today, the permitted charge for a CPST will consist of two elements. The first element is the permitted rate for channels offered on CPSTs on May 14, 1994, determined under current rules. The second element is the permitted rates for channels added to, or dropped from, CPSTs on or after May 15, 1994, determined under our new rules, or, if the operator so elects with respect to channel additions, our current rules as modified to remove the 7.5% mark-up on increases in programming costs under certain circumstances described below.[112] Operators must elect to apply either our new rules or our current rules the first time they adjust rates after December 31, 1994, to reflect a channel addition to a CPST that occurred on or after May 15, 1994, and must use the elected methodology for all rate

adjustments through December 31, 1997.[21*] Rates for the BST will continue to be governed exclusively by our current rules, except that where a system offered only one tier on May 14, 1994, the cable operator will be allowed to use the revised rules for channel additions to the BST, as if the tier was a CPST.

1. "Going Forward" Price Cap Structure

66. Operators electing to use the new rules may adjust their rates between January 1, 1995 and December 31, 1997, by up to 20 cents, exclusive of license fees, for each new channel added to CPSTs on or after May 15, 1994, subject to the Operator's Cap and the reserve for license fees, described below. Operators are not required to raise rates, but rather are permitted to do so. Operators may add channels under the new rules at any time from May 15, 1994 to December 31, 1997. They may not, however, raise their prices as a result of channel additions by more than $1.20 per subscriber per month between January 1, 1995, and December 31, 1996, and by more than $1.40 between January 1, 1995, and December 31, 1997 ("Operator's Cap").

67. Operators may use any portion of the Operator's Cap to pay for license fees between January 1, 1995 and December 31, 1996 for channels added between May 15, 1994 and December 31, 1996. Moreover, operators may recover an additional amount of not more than 30 cents per subscriber per month for license fees (the "License Fee Reserve") between January 1, 1995 and December 31, 1996 for channels added between May 15, 1994 and December 31, 1996.[22*] After December 31, 1996, license fees may be passed through to subscribers pursuant to our existing rules, except that, as described below, operators will not be allowed the current 7.5% mark-up on programming costs for channels added on or after May 15, 1994.[113]

68. The new going-forward rules for channel additions should benefit consumers by increasing their viewing options on existing CPSTs, while avoiding unreasonable price

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[21*] While we are requiring that operators use either the existing or the new going forward rules consistently for channel additions to CPSTs after December 31, 1994, an operator that chooses to use the new rules after that date may, but is not required to, adjust rates to reflect the new rules for channel additions made between May 15, 1994 and December 31, 1994. We are allowing operators to choose to continue using the current rules because the current rules provide greater channel addition incentives than the new rules in certain limited circumstances and some operators may have relied on the current rules in deciding to add channels.

[22*] The Operator's Cap and License Fee Reserve only apply to costs associated with new channels on CPSTs and do not affect the ability of operators to obtain rate adjustments for inflation or changes in external costs other than increases in programming costs of channels added under the new going forward rules. See 47 C.F.R. §§ 76.922(d)(2), (3).

increases for those tiers. Our revised rules are designed to continue to give "primary weight to the rates of systems subject to effective competition" in determining whether CPST rates are unreasonable.[114] As we explain in the Technical Appendix (attached as Appendix C to this Report and Order) the particular channel adjustment factors that we incorporate into our rules are based on a comprehensive analysis of the changes in channel offerings and rates operators made during the years prior to regulation, adjusted to account for the lack of effective competition. Just as cable systems that are subject to effective competition continue to add channels to CPSTs, our new rule is designed to allow some additions to these tiers by systems subject to regulation. We will permit such channel additions to be reflected in reasonable price increases commensurate with the added value subscribers are receiving.

69. A Commission review of a sample of 500 systems reported in the *Television and Cable Factbook* indicates that, in the five years prior to the passage of the 1992 Cable Act, 18.2% to 31.5% of cable systems in any one year increased rates by more than $0.50 per channel added, 3.3% to 10.8% raised rates by $1.50 or more per channel added and some raised rates by as much as $8.00 per channel added. The average per channel price for channels currently offered on BSTs and CPSTs is 43 cents and for channels currently offered on CPSTs is 65 cents.[23*] The $1.50 cap on retail price (i.e., the $1.20 Operator's Cap over two years plus the 30 cent License Fee Reserve) increases resulting from channel additions to CPSTs will allow subscribers to CPSTs to receive as many as six additional channels at an average cost of 25 cents per channel, including license fees, during the first two years.[24*] Our observation that six channels could be added at 25 cents per channel is not intended to limit the number of channels an operator may add to its CPSTs under our revised rules during the first two years. All that our rules require is that rate increases be limited. An operator is free to add as many channels as it wishes so long as it limits its rate increases.

70. The Commission recognizes that allowing operators to use the new rules when they add channels to CPSTs, but not when they add channels to BSTs, may create greater incentives to add channels to CPSTs than to BSTs. We believe this departure from tier neutrality is justified for at least three reasons. First, we agree with NATOA that preserving

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[23*] The figure for BSTs and CPSTs is an average for a random sample of 500 cable systems taken from the *Television and Cable Factbook* for the year 1991, the last year included in the sample. The figure for CPSTs is based on the 51 systems in the random sample of 500 systems offering CPSTs in each year from 1986 to 1991. Adjusting the 1991 prices for inflation would yield a 48 cents average price per channel for BSTs and CPSTs and 69 cents average for CPSTs in 1994 dollars. *See Television and Cable Factbook*, Volumes 54-59 (Warren Publishing 1986-1991).

[24*] As explained in the Technical Appendix, the $1.50 cap is the result of a 20 cent per channel mark-up and an average 5 cent per channel license fee, multiplied by 6 channels. An additional rate increase up to 20 cents plus license fee may be taken in the third year, if an additional channel is added (a seventh channel),

rate stability on the BST, which carries broadcast signals and which every subscriber must purchase in order to receive other programming services, is sufficient reason to limit the applicability of the revised channel addition rules to CPSTs. Although at the time we adopted tier neutrality, we found that suppressing rates for the BST would give operators incentives to move services off the BST and add to regulatory complexity,[115] we believe these factors have less weight where channel additions are at issue.[25*] Second, we believe that providing enhanced incentives to add channels to CPSTs will maximize choice for subscribers, because subscribers are not required to purchase CPSTs to obtain NPTs and will, therefore, be able to determine whether the CPSTs, any NPTs or both offer the best value. Third, we agree with NATOA that applying the revised rules to the BST would increase the complexity of the regulatory task faced by local regulatory authorities.[116] Accordingly, we limit application of the new rules to CPSTs, provided that an operator offers at least one CPST to subscribers. If an operator only offers a BST, the operator may use the new rules to make rate adjustments for adding channels to the BST.

71. In the succeeding paragraphs, we explain and justify each of the elements of this going forward price cap structure. In the Technical Appendix we justify and explain the particular values we have incorporated into this price cap structure. The Technical Appendix also details why we rejected various commenters proposals with respect to the going forward price cap structure. Our rules describe the application of these requirements in detail. The Commission will release a revised version of Form 1210 subsequent to this Report and Order.

2. Per Channel Adjustment Factor

72. As indicated, we establish a "per channel adjustment factor" of up to 20 cents per channel for channels added to CPSTs. Operators may increase rates by up to 20 cents, exclusive of programming costs, for each channel added to a CPST on and after May 15, 1994, subject to the Operator's Cap of $1.20 on rate increases attributable to channel additions through December 31, 1996, and $1.40 through December 31, 1997.[26*] An operator may

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[25*] Various commenters to our initial notice in this docket argued that the 1992 Cable Act intended to produce low rates for basic service. *See Rate Order* at paras. 193-194. Although we concluded that we had the authority to mandate a low-priced BST, we declined to do so. We found that a low-priced BST would give operators incentives to move services to other tiers where they could charge relatively high prices. We also found that if we mandated a lower price for BSTs than for CPSTs, it would complicate the regulatory scheme for regulators and operators. *Id.* at para. 197. However, because the 1992 Cable Act requires that the Commission consider different factors in setting BST and CPST rates, the Commission was not required to adopt tier neutral rates. *See* Communications Act §§ 623(b)(2), (c)(2); 47 USC §§ 543(b)(2), (c)(2).

[26*] An operator that added a channel on or after May 15, 1994, and raised its rates

(continued...)

choose a lower per channel adjustment, if that would further its business plan by, for example, allowing it to devote a portion of the Operator's Cap to license fees.

73. The per channel adjustment factor will compensate the operator for its costs of adding the channel plus a reasonable profit. Twenty cents falls within the historical range of 15-22 cents by which operators in a competitive environment would adjust rates for the addition of a new programming channel, exclusive of programming costs. We determined the 15-22 cent range by analyzing rate increases associated with growth in the number of channels offered in the five years prior to the 1992 Cable Act. The methodology we used in deriving the 15-22 cent range is set forth in the Technical Appendix.

74. In the *Rate Order*, we provided that any revenues received from a programmer, or shared by a programmer and an operator, must be netted against costs for purposes of calculating whether there has been an increase or decrease in external costs.[117] We extend this requirement for offsetting revenues against costs to the per channel adjustment factor for channels added to CPSTs pursuant to our revised channel adjustment rules. The revenues must be deducted from programming costs and then, to the extent revenues are remaining, from the per channel adjustment. Offsetting will apply on a channel-by-channel basis. We believe that this best balances the interest of the cable operator in being compensated for adding new programming and the interest of subscribers in receiving reasonable rates.[27*]

75. The per channel adjustment factor permitted by this Report and Order will apply only to net increases in channels from the highest number of channels offered on all CPSTs (excluding NPTs) on May 15, 1994 or any date thereafter.[28*] If an operator substitutes

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[26*](...continued)
pursuant to our existing rules, may revise its rates after December 31, 1994, using the new channel addition rules. As noted, *supra* at para. 65, an operator must use either the existing or the revised rules consistently for all channel additions on and after January 1, 1995.

[27*] Commissions received by an operator from programmers will be treated as revenues received from programmers. Any commissions cable operators receive from programmers must, therefore, be netted against programming costs for the purpose of determining whether there has been an increase or decrease in the operator's external costs. After commission revenues have been deducted from programming costs, if there are still revenues remaining, such revenues shall be deducted from the per channel adjustment.

[28*] An operator may receive a per channel adjustment for channel X if it substitutes channel Y for channel X and then adds channel X back to the system, so long as the addition of channel X represents the required net increase in the number of CPST channels. In contrast, an operator that had 20 channels on its CPSTs on May 15, 1994, 22 channels on its CPSTs on May 15, 1995, and 21 channels on its CPSTs on January 1, 1996, may not obtain a per channel adjustment for adding the 22nd channel back to its system on May 15, 1996. Rather, the 22nd channel is treated as a channel substitution. *See* para. 85, *infra.*

a new channel for an existing channel, no per channel adjustment may be made under the revised channel adjustment rules.[118] Rather, the operator should continue to charge the residual associated with the channel that was dropped. To permit an operator to receive a per channel adjustment in these situations would encourage operators to evade the purpose of the revised going forward incentives by substituting new for existing channels simply to get an additional per channel adjustment.

3. Operator's Cap

76. For the addition of new channels to CPSTs on or after May 15, 1994, we establish a per subscriber cap on the amount by which monthly cable rates may increase between January 1, 1995, and December 31, 1997. Operators may not make rate adjustments to monthly rates totalling more than $1.20 per subscriber over the first two years of the three-year period or more than $1.40 over the full three-year period.[29*] Rate changes prior to January 1, 1997 resulting from programming costs of new channels must fall within the Operator's Cap unless they are covered by the License Fee Reserve. Price increases will be counted against the Operator's Cap when rates are increased as a result of channel additions, not when the addition occurs. Any rate increases pursuant to the revised rules shall be subject to the notice and prior approval requirements of our regulations.[119] In addition, operators will be required to send the Commission copies of the notices sent to subscribers.

77. The Operator's Cap on the rate increase attributable to the addition of new channels to CPSTs is necessary because without such a cap, the per channel mark-up could create an incentive for operators to add large numbers of channels to CPSTs so as to increase the aggregate mark-up received. In the absence of rate regulation, cable operators with market power may be motivated to raise rates unreasonably. Because the rates of cable operators not subject to effective competition are lowered by regulation, these operators might use their market power to increase the number of channels on their CPSTs so as to regain the monopoly profits not available as a result of regulation. This result would undermine the 17% competitive rate reduction previously ordered by the Commission and could raise overall rates toward monopoly levels that would have occurred in the absence of the 1992 Cable Act. The result would be unreasonable CPST prices, contrary to the statutory requirements of the 1992 Cable Act. An unreasonable CPST rate also would cause the CPST to be an unattractive choice for subscribers, thereby removing it as a viable competitor to an NPT. The absence of a viable competitor would result in the lack of market constraints on NPT pricing. The result could be unreasonable NPT rates, in addition to unreasonable CPST rates. Thus, the Operator's Cap will help assure that both CPST and NPT rates remain reasonable.

[29*] The Operator's Cap will apply only to operators using the 20 cent per channel adjustment in our new rules. It will not apply to operators that elect to use our existing rules to adjust rates for channel additions occurring on and after May 15, 1994.

78. In addition, we adopt the Operator's Cap because there is no evidence that consumers want to pay for an unlimited number of channels in CPSTs.[120] The cap will also provide operators with incentives to choose which new services offered on CPSTs would be most valued by subscribers. Finally, because the per channel adjustment of up to 20 cents reflects an average based on historical data, adjusted for the lack of effective competition, it may provide some operators with a greater incentive to add channels than would exist in a competitive market. The Operator's Cap prevents operators from adding unlimited numbers of channels in these circumstances. The Operator's Cap will thus keep overall regulated rates reasonable and will provide an incentive to operators to add channels to CPSTs that subscribers will demand most.

79. As we explain in the Technical Appendix, before setting the Operator's Cap, we conducted an extensive analysis of rate changes instituted by cable operators prior to regulation and adjusted for the lack of effective competition faced by most systems at that time. In that analysis we observed that, in the five years prior to regulation, operators generally added on average 2.4 new channels per year to their basic and upper tiers. Our Operator's Cap would permit six channels to be added to CPSTs through December 31, 1996, assuming operators seek the full 20 cents mark-up per channel. In addition, a seventh channel may be added between January 1, 1997 and December 31, 1997 for an additional 20 cents.[30*] To ensure that rate increases associated with channel additions do not constitute an abuse of an operator's continuing market power and to ensure that rates remain reasonable, as explained below, the per channel adjustment is imposed to approximate rate adjustments an operator facing effective competition would receive for adding a channel.[121]

4. License Fee Reserve

80. We also establish a License Fee Reserve of 30 cents which operators may use, between January 1, 1995 and December 31, 1996, to recover programming costs for new channels. The License Fee Reserve may be applied against the initial license fee or any increase in the license fee for channels added during the first two years that the Operator's Cap is in effect. During this period, operators also may use all or any portion of the amount permitted as a per channel adjustment under the Operator's Cap to pay for license fees in excess of the License Fee Reserve. License fees incurred in the third year the Operator's Cap is in effect may be passed through to subscribers as external costs without counting against

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[30*] The Commission recognizes that the Operator's Cap may limit the number of additional services to be added to CPSTs through December 31, 1997. This limitation, however, affects CPSTs only. Because we are allowing operators to place unlimited numbers of new services on NPTs at prices that operators choose, we believe operators will have adequate incentives to offer additional programming services. Hence, the cap will limit price increases on CPSTs without unduly restricting the ability of operators to provide new programming to their customers.

either the License Fee Reserve or the Operator's Cap.[31*]

81. The 30 cents License Fee Reserve would allow 6 channels to be added at an average license fee of 5 cents per channel.[32*] The 5-cents average, per channel license fee falls within the historical range of 4-12 cents which we observed. Within that range, we determined that a choice toward the lower end of the range was appropriate because the 12 cent upper figure included price increases for programming already on operators' systems as well as for new programming. The methodology we used in deriving the License Fee Reserve is explained in the Technical Appendix.

82. We have adopted a License Fee Reserve in response to programmers' concerns that a cap on total rate increases attributable to new channels, without a reserve for license fees, might give rate-regulated cable operators incentives to increase profits by adding only no cost or low cost channels.[122] That is, if we adopted only the $1.20 cap for the first two years of the Operator's Cap, which includes the 20 cent per channel adjustment, operators might add six channels over the first two years with no license fees so as to maximize their share of the rate increase. The License Fee Reserve makes no judgment about the relative value to subscribers of high or low cost channels, but seeks to replicate the incentives operators would have to add channels in a competitive market, which accommodates both low and high cost services.

5. Programming Cost Increase Mark-Up

83. We have decided not to allow operators using the per channel adjustment under our new rules to take the 7.5% mark-up on programming cost increases, including retransmission consent fees and copyright fees incurred for coverage of broadcast signals, for channels for which the per channel mark-up of up to 20 cents was taken.[33*] Our analysis indicates that the per channel adjustment of up to 20 cents for additional channels, in addition to the License Fee Reserve, will provide full and fair compensation to operators adding channels to CPSTs. Operators who have added channels prior to the effective date of the new rules will not be harmed by this change since the operators may elect to add channels to CPSTs under the old or the new rules.

[31*] As noted, an inflation adjustment may be passed through to subscribers pursuant to 47 C.F.R. § 76.922(d)(2) without regard to the License Fee Reserve or Operator's Cap.

[32*] An operator taking the maximum 20 cents per channel adjustment could add 6 channels under the $1.20 Operator's Cap applicable during the same period.

[33*] In addition, as described below, we seek comment on whether the 7.5% markup should be restricted further. *See* paras. 133-134, *infra*.

6. Deletion And Substitution of Channels

84. The attached regulations also specify how operators shall adjust rates for BSTs and CPSTs when channels are dropped from, or moved between, BSTs and CPSTs. In general, when dropping a channel from a BST or CPST, operators will be required to make their rates reflect the net reduction in external costs as is required under our existing rules.[123] Operators also will be required to reduce the price of that tier by the "residual" associated with that channel. For channels that were on a BST or CPST on or before May 14, 1994 or channels added after that date pursuant to the current rules, the per channel residual is the charge for the tier, minus the external costs for the tier, and any per channel adjustments made after that date, divided by the number of channels on the tier. For channels added to a CPST on or after May 15, 1994 pursuant to our new channel addition rules, the residuals shall be the actual per channel adjustment taken for that channel when it was added to the tier plus any inflation adjustment since that time. The residual and programming cost shall be calculated as of the date the channel is dropped.

85. As noted above, when an operator substitutes a new channel for an existing channel on a CPST, no per channel adjustment may be taken. The residual for the new channel is that of the channel it replaced. Operators substituting channels will be required to adjust their rates for changes in license fees as provided by our current rules. To preserve the overall effectiveness of the Operator's Cap and the License Fee Reserve, if the license fee for the new service is greater than the license fee for the replaced service, and the operator chooses to pass that increase through to subscribers, the excess shall count against the aggregate of the Operator's Cap and the License Fee Reserve. If the license fee for the new channel is less than the license fee for the replaced channel, no credit shall be given against the cap or the reserve, so as not to create an artificial incentive to replace higher license fee channels with lower license fee channels. With respect to channels to which the 7.5% mark-up on new programming costs applies, the operator shall treat the mark-up as part of its programming costs and subtract the mark-up from its external costs when a channel is dropped. When such a channel is substituted, the operator may retain in its rates the 7.5% mark-up on the license fee of the dropped channel, so long as that amount is not more than 7.5% of the license fee of the new channel.

86. When a channel is shifted between a BST and a CPST or between CPSTs, it shall be treated as if it was dropped from one tier and the residual and programming cost associated with the shifted channel shall be shifted to the other tier. The residuals associated with the shifted channel shall be adjusted by reference to the number of subscribers on each tier to ensure aggregate revenues remain the same.[34*] Revenue neutrality protects consumers

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[34*] An operator may use the equivalent billing unit ("EBU") methodology in calculating the number of subscribers on a tier, provided it does so for both the tier from which the channel is shifted and the tier to which the channel is shifted and provided that the operator

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by ensuring that our requirements do not create incentives for operators to move channels to tiers with more subscribers solely to increase revenues. And because the per channel adjustment of up to 20 cents applies only to the CPSTs, an operator may not move a channel for which it received a per channel adjustment under the new rules from a CPST to the BST. Our revised rules describe in detail the application of these requirements.

7. Headend Upgrades for Small Systems

A. Background

87. The Commission recognizes that regulatory and administrative burdens placed on small systems[35*] and small multiple system operators ("MSOs") by our regulations may be greater than the burdens faced by other operators.[36*] The Commission has adopted various transition and administrative procedures in order to alleviate regulatory burdens experienced by small systems and small MSOs.[124]

B. Comments

88. In order to give small systems incentives to add channels, CATA suggests that the Commission adopt a sliding scale that would permit higher rates to be charged for new channels as the subscriber base decreases from 1,000 to 100.[125] CATA's comments indicate that the capital used to purchase cable equipment must come from additional fees charged subscribers before reasonable profits can be made.[126] Since equipment costs are fixed, the smaller the system, the longer it will take to recover equipment costs and the less incentive

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[34*](...continued)
otherwise meets the conditions for using EBU methodology. *See Public Notice: Question and Answer on Cable Television Rate Regulation* (July 27, 1994) Question and Answer 1.

[35*] A small system is a cable system that serves 1,000 or fewer subscribers from the system's principal headend, including any technically integrated headends and microwave receive sites. *See* 47 C.F.R. § 76.901(c).

[36*] A small MSO is defined as a MSO that has 250,000 or fewer total subscribers, owns only systems with less than 10,000 subscribers each, and has an average system size of 1,000 or fewer subscribers. *See* 47 C.F.R. § 76.922(b)(5); *see also Cost Order* at para. 278. We note that the Commission has solicited comments on whether it should retain its current definitions of small operators and small systems owned by small MSOs and whether it should employ the current Small Business Administration definition of small cable company. *See Fifth Order on Reconsideration and Further Notice of Proposed Rulemaking* ("*Further Notice*"), MM Docket No. 92-266 and 93-215, FCC 94-234, 59 FR 51869 (1994). The definitions of these terms may be affected by the comments received in response to the *Further Notice*.

there is to add channels.[127]

89. According to CATA, typical per channel equipment costs associated with the addition of satellite-delivered channels are $500 to $1,000 for a receiver to convert from satellite frequencies to video baseband, $800 for a descrambler, and $1,250 for a signal processor.[128] CATA states that labor costs are dependent on various factors, including whether additional satellite dishes are needed.[129] In addition, CATA comments that an additional satellite dish costs approximately $2,500.[130]

90. Summit also submitted comments focusing on the ability of small cable systems to recover equipment costs associated with the addition of new channels.[131] Summit states that even the combination of a pass-through of programming cost plus a mark-up does not cover the costs of headend equipment required to add a channel to a small cable system and, therefore, these costs should be accorded external cost treatment.[132]

C. Discussion

91. We have decided to adopt a special streamlined cost-of-service procedure for independent small systems and small systems owned by small MSOs that upgrade their headend equipment to add new channels to CPSTs. This procedure addresses CATA's concern that small systems may find it difficult to recover the fixed costs of the headend equipment required for adding channels, since the cost must be recovered over a small subscriber base. We limit this relief to independent small systems and small systems owned by small MSOs because (1) systems with more than 1,000 subscribers can spread the fixed costs of headend equipment over a larger customer base and (2) small systems owned by larger operators should have adequate financial resources to add channels under our generally applicable rules. Qualified small systems that add channels to their CPSTs, therefore, have the option of either using this special procedure or using the existing or revised going forward rules applicable to all operators.

92. Under this streamlined cost-of-service procedure for upgrading headend equipment, independent small systems and small systems owned by small MSOs may increase rates to recover the costs associated with new headend equipment that is used to add channels to CPSTs. In order to recover costs for headend equipment, qualified small systems will be required to certify to the Commission the level of costs they have actually incurred for adding headend equipment.

93. Notwithstanding these concerns, we do not want to burden subscribers of small systems with paying high rate increases Therefore, as we have done with our new per channel adjustment formula, we have decided to limit the amount small systems may recover under this special allowance to prevent unreasonably sharp rate increases to small system subscribers. The amount a small system may recover for each channel added shall be limited to programming costs incurred plus the lesser of the actual cost of the headend equipment or

$5,000.[37*] Headend costs that are to be recovered through increased rates must be depreciated over the useful life of the equipment.[38*] In addition, we find that the rate of return the small system may earn on this investment may not exceed 11.25%.[39*]

94. Small systems may apply this streamlined cost-of-service procedure for channels added after May 14, 1994, but may not use this methodology to increase rates to reflect channel additions until January 1, 1995. Moreover, small systems that increase rates as a result of any channel additions pursuant to either this methodology may add a maximum of seven channels to CPSTs over the next three years. This is equal to the number of channels that a system taking the maximum 20 cent per channel adjustment may add under the Operator's Cap.

8. Systems with More than 100 Channels

95. In our *Fifth Notice*, we noted that the *Fourth Report and Order (Fourth Report)* in MM Docket No. 92-266 established per channel adjustments for systems with total channels on regulated tiers of 100 channels or fewer. It did not establish per channel rates for systems that provide more than 100 channels.[133] We solicited comment on whether we should establish a method for adjusting capped rates in situations where there are more than 100 regulated channels and, if so, what that method should be. We also sought comment on whether we could use mathematical formulations derived from existing data or tables. We asked whether instead of adopting a method for setting rates for offerings of more than 100 channels, we should cap rates at the 100 channel level unless the operator could justify a higher rate based on a cost-of-service showing. We solicited comments on how any of these proposals would affect incentives for operators to provide additional channels on an a la carte basis. We additionally asked whether our going forward methodology should be modified to provide greater or lesser compensation to operators for adjustments to capped rates when channels are added or deleted from BSTs and CPSTs, and whether this would better meet our

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[37*] This figure is consistent with CATA's representation that the addition of a satellite channel can cost between $2,500 and $5,000. *See* CATA Comments at 6.

[38*] While the Commission has not prescribed depreciation rates, cable operators are required to follow reasonable depreciation practices. Depreciation and useful life of the equipment are to be submitted to the Commission with the cost certification.

[39*] We previously selected 11.25% as the presumptive rate of return in our interim cost-of-service rules. *See Report and Order and Further Notice of Proposed Rulemaking*, MM Docket Nos. 92-266, 93-215, 9 FCC Rcd 4527 (1994) (*"Cost Order"* or *"Cost Further Notice"*) at paras. 204-208. Because this is an optional streamlined procedure that allows independent small systems and small systems owned by small MSOs to recover for headend equipment costs associated with the addition of new channels, we are not permitting these system operators to rebut the 11.25% rate of return in this context. They could, however, attempt to do so in the context of regular cost-of-service proceedings.

goals of encouraging infrastructure development and growth of programming. We stated that operators should provide a complete factual justification for any claims that the current methodology is inadequate.[134]

96. With respect to the Commission's request for comments on how to deal with systems with 100-plus channels, CATA states that if the Commission would increase the per channel adjustment to 25 to 50 cents, there would be no need for a special mechanism for systems with over 100 channels.[135] Time Warner, Inc. ("Time Warner") argues that the Commission cannot derive a formula for 100-plus channel systems from the existing data tables because those tables are based upon data for systems with fewer than 100 channels and include systems that did not implement any upgrade.[136] Providence Journal asks the Commission to deregulate rates for channels in excess of 100.[137] TCI proposes that the Commission set a demarcation point at 75 regulated channels, allow cable operators to choose which 75 channels are regulated, and deregulate all additional channels.[138] GTE Service Corporation, a telephone company, favors establishing rates for 100-plus channel systems in accordance with price cap principles, rather than requiring a cost-of-service showing.[139]

97. Our existing going forward regulations use a declining per channel adjustment as the number of channels on a system increase. In contrast, in this Report and Order we have decided to allow (1) a flat per channel adjustment for the addition of new channels to CPSTs, subject to an Operator's Cap, and the License Fee Reserve, and (2) NPTs for which cable operators set the price. Because our revised regulations allow operators to set the price for an unlimited number of channels on NPTs, we do not believe it is necessary to adopt any other rules that are based on a specific number of channels.[40*]

9. Term of the Revised Channel Addition Rules

98. The new rule for adjusting rates when channels are added, deleted or substituted on CPSTs will be in place through December 31, 1997, and will be reviewed prior to the end of that period to determine if there is any reason to continue to provide incentives to increase the number of channels on any CPST. The new rule will expire on that date and will be replaced by our existing rule unless it is reinstated by the Commission. The special streamlined cost-of-service procedure for headend equipment costs for small systems also will expire on December 31, 1997 unless it is reinstated by the Commission.

[40*] Cable operators continuing to add channels under our current rules may receive a per channel incentive only for the first 100 channels on BSTs and CPSTs. *See Fifth Notice* at para. 255.

VI. Negative Option Billing

A. Background

99. Section 3(f) of the 1992 Cable Act prohibits negative option billing, which occurs when a cable operator charges a subscriber for any service or equipment that the subscriber has not affirmatively requested by name.[140] A subscriber's failure to refuse a cable operator's proposal to provide such service or equipment may not be deemed to be an affirmative request for such service or equipment.[141] The *Rate Order* provided that changes in the mix of programming in a tier, including additions or deletions of channels, will not be subject to the negative option billing provision unless they change the fundamental nature of the tier.[142] We believe that, on balance, the benefits to subscribers from giving operators the ability to diversify, improve or otherwise modify their offerings in a tier outweigh the slight reduction in subscriber choice that results from exempting such changes from the negative option billing prohibition.[143]

100. In the *Rate Order*, we held that it is not necessary to subject any service changes accompanied by a price increase to the negative option billing prohibition, provided that these changes do not change the fundamental nature of the tier, because subscribers will receive 30 days' advance notice of any rate, programming or channel changes, and any actual or implicit rate changes will be subject to our rate regulations.[144] We also stated that restructuring tiers and equipment, including restructuring necessary to comply with the 1992 Cable Act, will not violate the ban on negative option billing, unless the restructuring constitutes a change in the fundamental nature of the tier.[145] Finally, we stated that the negative option billing prohibition does not apply to system-wide equipment improvements accompanied by rate increases.[146]

101. The *Rate Order* provided that operators could pass increases in external costs and inflation adjustments through to subscribers.[147] We did not address whether passing these costs through constitutes negative option billing.

102. In the *Third Reconsideration Order,* we concluded that the Commission and state and local governments have concurrent jurisdiction to regulate negative option billing. The rationale for this conclusion was that regulation of negative option billing, while discussed in the section of the 1992 Cable Act governing rate regulation, is more in the nature of a consumer protection measure than rate regulation *per se*.[148] Section(8)(c)(1) of the 1992 Cable Act, codified in Section 632(c)(1) of the Communications Act, provides that nothing in the "Consumer Protection Laws" title of the Communications Act may "be construed to prohibit any State or any franchise authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted by this title."[149] Given our conclusion that Section 3(f) of 1992 Cable Act is a consumer protection measure, we stated that Section 632(c)(1) of the Communications Act preserves the ability of a state or local government to regulate negative option billing except to the extent such regulation is "specifically preempted."[150]

103. We found in the *Third Reconsideration Order* that there is nothing in the language of Section 3(f) of the 1992 Cable Act or its legislative history to suggest that state and local authorities are specifically preempted from regulating negative option billing.[151] In fact, the legislative history refers to the efforts of state attorneys general in this area, which further supported our conclusion that there is no specific preemption. However, we also stated that if we became aware of a particular state or local regulation of negative option billing that went beyond consumer protection and instead approached actual regulation of "rates for the provision of cable service" we would consider the question of federal preemption in that specific factual context.[152]

B. Comments

104. On reconsideration, Time Warner and NCTA request that we clarify what channel additions to a tier will not require affirmative marketing under Section 3 (f) of the 1992 Cable Act. They also asked us to declare that local authorities may not require affirmative marketing for channel additions under state or local laws.[153] More specifically, NCTA asks us to clarify that three specific "scenarios" do not trigger the federal negative option billing rule and that state or local authorities are preempted from enacting or enforcing their own negative option billing laws. The three scenarios are:

(1) a cable operator raises its rates (with no change in service or equipment offerings) as a result of passing through external costs or inflation adjustments, as provided by the Commission's rules;

(2) an operator changes its rates as a result of the addition or deletion of channels to its regulated tiers pursuant to the Commission's "going forward" regulations; and

(3) an operator replaces an existing channel of service on a regulated tier with a different channel of service, with or without a change in the rates.

105. In support of its position, NCTA points to the *Rate Order*, where we stated that the negative option billing prohibition is not violated by: (1) changes in the mix of programming on a tier, including additions or deletions of channels; (2) rate changes accompanying changes in regulated programming unless there is a fundamental change in service; or (3) restructuring of tiers and equipment if subscribers will continue to receive the same number of channels and the same equipment unless there is a fundamental change in service.[154] NCTA claims that these provisions make clear that, as a matter of federal law, neither rate increases resulting from Commission approved pass-throughs of external costs or inflation adjustments nor channel changes resulting from the addition or deletion of programming to a regulated tier would violate the negative option billing rule. Moreover, NCTA argues that because the three situations in its letter "plainly implicate rate regulation," rather than the marketing or billing of those services, and "clearly are not violative of federal

negative option billing requirements, state and local authorities are preempted from enforcing their laws in a manner inconsistent with the federal determinations."[155]

106. NCTA states that the practical consequences of permitting state and local authorities to require that cable operators obtain subscribers' affirmative consent before implementing federally permitted rate increases or channel changes would be far reaching.[156] According to NCTA, without federal preemption, a cable operator could be effectively precluded from achieving the return permitted under the Commission's price cap and going forward rules[157] NCTA also states that if any of these minor changes were considered to be subject to the negative option billing prohibition, subscribers who do not affirmatively "request" the "service" would have their service discontinued, and most subscribers would not even realize why their service had been cut off.[158]

C. Discussion

1. Application of the Negative Option Billing Rules to the Three Scenarios

107. In determining whether any of the scenarios involve negative option billing, we are guided by the language of the negative option billing provision, its legislative history, and our prior interpretations. Section 3(f) states that "[a] cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name." "Service" may be read very broadly.[41*] But if "service" were read in that manner, the negative option billing provision would require a cable operator to obtain subscribers' affirmative consent before making any change in offerings, including even relatively minor changes such as the addition of one channel to a large tier, and the legislative history makes clear that such an interpretation is not appropriate. With regard to the negative option billing provision, the Conference Committee explained:

> The language adopted by the conferees ensures that cable operators will not be able to charge customers for tiers or packages of programming services or equipment that they do not affirmatively request as well as individually-priced programs or channels. This provision is not intended to apply to changes in the mix of programming services that are included in various tiers of cable service.[159]

[41*] "Cable service" is defined in the Communications Act § 602(6) as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection of such video programming or other programming service." Codified at 47 U.S.C. § 522(6). Communications Act § 602(16) defines "service tier" as "a category of cable service or other services provided by a cable operator and for which a separate rate is charged by the cable operator." Codified at 47 U.S.C. § 522(16).

In light of that guidance, we have concluded that "a change in the mix of channels in a tier, including additions or deletions of channels, will not be subject to the negative option billing provision, unless they change the fundamental nature of the tier."[160] We adhere to that construction of the negative option billing provision.

108. With respect to NCTA's first scenario, which involved passing through external costs or inflation adjustments, we hold that these types of rate changes do not in and of themselves invoke the federal negative option billing rule. As an initial matter, they do not constitute "service or equipment" within the meaning of Section 3(f). Moreover, under our rate regulations, operators are specifically permitted to pass through to subscribers increases in external costs and inflation adjustments.[161] These types of rate changes do not constitute a change in the fundamental nature of a tier, and, therefore, do not implicate the federal negative option billing prohibition for that reason as well.

109. With regard to the second and third scenarios identified in NCTA's letter, we specifically addressed how we would treat channel changes with respect to negative option billing in the *Rate Order*. We stated that "a change in the mix of channels in a tier, including additions or deletions of channels, will not be subject to the negative option billing provision, unless they change the fundamental nature of the tier."[162] We believe that, on balance, consumers benefit from giving operators the ability to diversify, improve or otherwise modify their offerings without obtaining every subscribers' affirmative consent.[163]

110. Determinations as to what constitutes a change in the fundamental nature of a tier will generally depend on the individual circumstances of each case. However, as we indicated in the *Rate Order*, if an operator deleted all existing channels from a particular tier and added a completely new set of channels, this would change the fundamental nature of the tier, thus requiring subscribers' prior affirmative assent.[164] Accordingly, channel changes involving relatively few channels generally will not change the fundamental nature of that tier, and thus will not implicate the federal negative option billing rule. Consistent with this approach, additions of channels and rate adjustments within the Operator's Cap and License Fee Reserve of our revised going forward rules generally will not change the fundamental nature of a tier.[42*] As we indicated in the *Rate Order*, because our rules require operators to give subscribers 30-days' advance notice of any changes in rates, programming or channel positions,[43*] we do not believe subscribers need the additional protection of the negative option billing provision for relatively modest changes.[165]

[42*] Affirmative marketing also is not required when an operator moves channels pursuant to our conditions for establishment of NPTs, so long as the movements do not change the fundamental nature of the tier. *See* discussion at note 10*, supra.

[43*] The 30-days' notice requirement applies to all rate or service changes, including the addition, deletion or substitution of channels, whether or not the fundamental nature of the tier is affected.

2. State Authority

111. Section 632(c)(1) of the Communications Act provides that "[n]othing in this title shall be construed to prohibit any State or any franchising authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted by this title." This provision makes clear that state and local authorities generally may apply statutes proscribing fraud or misleading advertising practices to cable operators. We have recognized that negative option billing practices are also usually "in the nature of a consumer protection measure rather than a rate regulation provision *per se*."[166] Hence, state and local consumer protection laws apply to negative option billing practices. For example, if a cable operator engaged in a practice that violated the terms of the negative option billing provision added by the 1992 Cable Act and the terms of a state or local negative option billing rule, enforcement could proceed under state and local law as well as under federal law.

112. However, Section 3(a)(1) of the 1992 Cable Act makes clear that regulation of "the rates for the provision of cable service" is governed exclusively by the federal statute and Commission regulations. It therefore "specifically preempts" state and local regulation that is inconsistent with the federal rules. We have recognized that there may be cases where "state or local regulation of negative option billing goes beyond consumer protection and instead approaches actual regulation of 'rates for the provision of cable service.'"[167] In such a case, state or local regulation would be prohibited by the 1992 Cable Act. The scenarios NCTA presents require us to consider again the relationship between Section 632(c)(1) of the Communications Act and Section 3(a)(1) of the 1992 Cable Act.

113. We conclude that a two-step approach is warranted. First, is the state or local negative option rule consistent with the federal rule? If it is, then the state or local rule may be enforced. If the state or local rule is inconsistent with the federal rule, then it is necessary to consider whether its enforcement "approaches, actual regulation of 'rates for the provision of cable service.'"[168] In elaborating on that inquiry, we now conclude that state or local consumer protection laws may not be enforced in a manner that conflicts with or undermines our rate regulation rules established pursuant to Section 3 of the 1992 Cable Act. If there is an actual conflict between federal and state law or where state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress, the state law is preempted.[169]

114. Underlying our approach is our construction of Section 632(c)(1) of the Communications Act. That provision makes clear, in our view, that Congress has not so comprehensively occupied the cable field that there is no room for the enforcement of state consumer protection laws. In the absence of Section 632(c)(1) of the Communications Act, a powerful argument could be made to the contrary, because the 1992 Cable Act is comprehensive legislation that relates to nearly all aspects of cable television.[170] Moreover, Section 632(c)(1) of the Communications Act makes clear that there is room for enforcement of state and local consumer protection laws, along with federal enforcement, wherever state or local law does not conflict with federal law. But where there is conflict that would

undermine our enforcement of the rate rules Congress ordered us to implement, state and local law must give way.

115. The scenarios NCTA presents involve situations where enforcement of state and local negative option billing rules would be inconsistent with the federal rule and enforcement might undermine implementation of the cable rate rules we have promulgated pursuant to Congress's instruction. With respect to the first scenario, the federal negative option billing rule plainly would not require cable operators to obtain affirmative consent from subscribers before passing through external costs and inflation adjustments as permitted by our rules, as explained above. In addition, enforcement of a state or local negative option billing rule requiring affirmative consent prior to the pass-through of external costs and cost-of-service increases, as permitted by our rate rules, would undermine the federal regime governing cable rates. We have issued detailed rate rules implementing Section 3 of the 1992 Cable Act. Under our rules, most cable operators must reduce their rates from pre-1992 levels, many by as much as 17%, to ensure that cable rates are reasonable. However, as the first scenario presented by NCTA recognizes, our rules also allow cable operators to increase their rates to reflect increases in the cost-of-living or other external costs, most of which are beyond cable operators' control. The 17% rate reduction and the rules authorizing the pass-through of external costs and inflation adjustments are of a piece; the rate cut would not be fair to cable operators if they were prohibited from raising rates to reflect increased costs that are beyond their control. The result would be unreasonably low rates, contrary to Congress's command that we must ensure that cable operators that do not face effective competition charge "reasonable" rates.[171]

116. If state or local officials were able to enforce negative option billing rules that, contrary to the federal negative option billing rule, require cable operators to obtain affirmative consent before increasing rates to reflect increases in inflation or other external costs, our cable rate rules would be fatally undermined. As NCTA states, cable operators would not be permitted to increase rates until a subscriber completed a form authorizing the rate increase, even though the increase was fully justified under our rate rules. As a practical matter, chaos would ensue every time a cable operator tried to increase rates as permitted under our rate rules, and our rules authorize cable operators to pass through external costs quarterly.[172] Rate increases would not be permitted until each subscriber gave affirmative consent, and subscribers would have no reason to consent unless cable operators threatened to cut off service and followed through on that threat with respect to subscribers who failed to complete and mail the form authorizing the rate increase. Moreover, since many subscribers undoubtedly fail to read carefully every mailing from their cable operator, many subscribers would have their service cut off, to their surprise and dismay, each time a cable operator passed through external costs. That would impose significant transaction costs on cable operators and subscribers for no good reason. Accordingly, we conclude that state and local authorities may not enforce negative option billing rules that preclude cable operators from passing through cost-of-living increases and other external costs that are permitted to be

passed through under our rate rules.[44*]

117. The other two scenarios presented by NCTA involve the addition, deletion and replacement of channels. Our negative option billing regulation makes clear that the requirement that cable operators obtain affirmative consent before charging for a new service "shall not preclude the addition or deletion of a specific program from a service offering, the addition or deletion of specific channels from an existing tier of service, or the restructuring or division of existing tiers of service that do not result in a fundamental change in the nature of an existing service, or tier of service."[173] Accordingly, the replacement of a single channel, NCTA's third scenario, would not be prohibited by the federal negative option billing provision, because that would not result in a "fundamental change" unless the tier was very small. With respect to NCTA's second scenario, involving the addition or deletion of channels, the answer would depend on how many channels were added or deleted and other factors relevant to determining whether a "fundamental change" had occurred. As stated above, however, changes that are permitted under our "Operator's Cap" generally would not constitute "fundamental changes."

118. If the addition, deletion, or replacement of channels did not constitute a fundamental change in a tier, so that the federal negative option billing rule was not triggered, preemption of enforcement of a stricter state or local negative option billing rule would depend on whether enforcement would conflict with or undermine our rate regulation rules established pursuant to Section 3 of the 1992 Cable Act. It is not possible to provide a blanket response to NCTA's second and third scenarios in the absence of a specific set of facts to evaluate. However, it bears emphasis that our rate rules governing the addition, deletion, and replacement of channels are designed to ensure reasonable rates without impeding the provision of new services. Indeed, our rate rules are designed to encourage the provision of new services that subscribers desire at the reasonable rates mandated by Congress. Therefore, an interpretation of state or local law that required a cable operator to obtain the affirmative consent of every subscriber before making a change that did not fundamentally alter the affected tier would, in most cases, interfere with the accomplishment of Congress's objectives. The transaction costs imposed by a negative option billing requirement would create a major incentive for cable operators to freeze their service offerings. Thus, the goals of the rate regulation regime we have designed pursuant to Congress's direction would be frustrated and undermined if state and local governments enforced negative option billing rules that thwarted the accomplishment of the goals of our rate regulations. Indeed, state and local officials in effect would set cable rates by discouraging the addition, deletion, or replacement of channels even where the change did not fundamentally alter the nature of a tier.

[44*] Certified local franchising authorities may review such rate changes on the BST pursuant to our rate regulations and may file a complaint with the Commission regarding rate changes on CPSTs.

119. We recognize that we stated in the *Third Reconsideration Order* that "[S]ection 3(a) of the 1992 Cable Act generally does not 'specifically preempt' state and local governments from enacting and enforcing state or local consumer protection laws that may address negative option billing practices of cable operators."[174] We believe that statement remains correct following our further consideration of when enforcement of state or local negative option billing rules would "approach actual regulation of 'rates for the provision of cable service.'"[175] In most cases, we think state and local officials would enforce negative option billing rules that are consistent with the federal rules. In relatively few cases, in our view, would state or local officials be likely to seek to enforce negative option billing rules that conflict with or undermine federal rate regulation provisions. But in any event, on further consideration we are convinced that, however numerous such cases are likely to be, state and local officials may not enforce negative option billing rules that obstruct the accomplishment of the objectives of Congress's cable rate provisions.

VII. Affiliate Transactions

A. Background

120. In the *Cost Order*[176] in MM Docket No. 93-215, the Commission promulgated a rule for valuing transactions between cable operators and affiliated companies. The Commission found that it would be inconsistent with Congressional intent to allow rates for regulated cable service to reflect the prices affiliates charge each other for transactions that occur at other than an arm's length. The Commission found that allowing cable companies to pass increases in their costs through to rate payers could motivate those companies to pay excessive amounts for assets and services obtained from unregulated affiliates.[177] The Commission also found that allowing service pass-throughs could induce cable companies to undercharge unregulated affiliates since the undercharges could be offset by increased charges to subscribers.[178]

121. We therefore adopted a rule for affiliate transactions that applies to cable operators who elect cost-of-service regulation or seek to adjust benchmark/price cap rates for affiliated programming costs. This rule applies valuation methods that are similar to those telephone companies are now required to apply. The rules distinguish between asset[45*] transfers and the provision of services.[179] Under the rule, charges for assets purchased by a cable operator from an affiliate, or sold by a cable operator to an affiliate is valued at the asset provider's prevailing company price, if the provider has sold the same kind of asset to a substantial number of third parties at a generally available price.[180] Absent a prevailing company price, the cable company is required to value the asset at the higher of net book cost and estimated fair market value when the regulated cable system is the seller, and at the lower

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[45*] For the purpose of evaluating affiliate transactions that involves programming, we classify programming as an asset.

of net book cost and estimated fair market value when the regulated cable system is the buyer.[181]

122. Charges for services purchased by a cable operator from an affiliate or sold by a cable operator to an affiliate are valued at the provider's prevailing company price, if the provider has sold the same kind of service to a substantial number of third parties at a generally available price. When the provider has established no prevailing company price, the cable operator is required to value the service at the service provider's cost.[182]

123. In the *Cost Further Notice,* we tentatively concluded that the general changes we proposed for affiliate transactions involving telephone companies should be applied to cable operators.[183] Accordingly, the Commission proposed a further limitation on the application of the prevailing company price as a measure of a reasonable price for an affiliate transaction.[184] We tentatively concluded that the use of prevailing company pricing as a valuation method for transactions between cable operators and their affiliates should only be permitted where the predominant purpose of the transaction is to serve nonaffiliates. To that end, we proposed that any affiliate that sells less than 75 percent of its output to non-affiliates has too large a volume of affiliate transactions to be deemed to have a predominant purpose of serving non-affiliates. We therefore proposed to continue to allow prevailing company pricing as a valuation method for affiliate transactions only where at least 75 percent of the cable operators output is sold to non-affiliates.[185]

B. Comments

124. The cable industry generally opposes the proposed rule arguing that the proposal would require operators and programmers to adopt costly, inefficient and unnecessary methodologies to document the estimated fair market value of the assets or services exchanged. Time Warner and TCI argue that the 75% bright-line test would impose administrative burdens that would be excessive and outweigh the speculative benefits that might result.[186]

125. BellSouth endorses the existing rule and opposes the proposed rule as unduly burdensome.[187]

126. Several other parties oppose the proposed rules on the grounds that these requirements would discourage vertical integration and would result in decreased investment in quality cable programming.[188] Several programmers also argue that the current rules permit vertical integration and thus encourage investment in programming while the proposed rules would penalize cable operators for carriage of programs produced by affiliated programmers and effectively discourage vertical integration.[189] Other parties, observing that rules similar to the proposed rules for cable are being considered for local exchange carriers, argue that regulatory parity warrants the application of such rules to cable companies.[190] Bell Atlantic states that while the proposed rules may be too restrictive, the Commission should adopt uniform rules for cable and telephone companies.[191]

127. USTA opposes the proposed cable rules, however, arguing that the proposal is inappropriate for both cable operators and telephone companies.[192] NCTA also opposes the proposal and states that the only rationale for the rules comes from an incorrect premise that the application of such rules in the telephone context necessitates similar rules in the cable industry.[193]

C. Discussion

128. We decline to adopt the proposal to prevent cable operators from valuing assets or services at the operators' prevailing company prices unless the providing affiliates sell more than 75% of their output to nonaffiliates. We find that this proposal would prevent, in many cases, cable operators from establishing a prevailing company price for programming services that have achieved wide distribution among cable operators. The record demonstrates, for example, that under the proposed rule, cable operators would be unable to value at a prevailing company price such ubiquitous services as the Cable News Network, TNT, WTBS, ESPN, MTV, and USA due to these programmer's affiliations with major MSOs.[194] We will, therefore, not adopt the proposed rule because there is no evidence in the record to suggest that a cable operator would have an incentive to pay excessive amounts for assets or services obtained from affiliates where an asset or service is widely distributed among cable operators.

129. In addition, we are concerned that by preventing cable operators from valuing programming at the prevailing company price, we may discourage major MSOs with substantial resources from investing in cable programming and related services that could benefit subscribers. Thus, the proposed rule may discourage efficiencies in the distribution, marketing and purchase of programming which may, in turn, reduce subscriber fees and cable rates. Programmers may also lose access to cable industry financing for innovative, creative video programming.

130. We will, therefore, retain the existing cable affiliate transaction rule which provides that a cable operator may value an asset or service at the prevailing company price if the provider has sold the same kind of service or asset to a substantial number of third parties at a generally available price. We find that for cable affiliate transactions, the sale of an asset to a substantial number of third parties will ensure that cable operators will not have an incentive to pay excessive prices when they obtain services and assets from affiliates because in such cases the primary purpose of the transaction would not be to provide services and assets to the affiliated programmer. However, we will continue to examine our test for the establishment of a prevailing company price in MM Docket No. 93-215 and as we gain experience with our current cable affiliate transaction rule, we may seek further comment in order to refine the rule.

131. Finally, the *Cost Further Notice* sought comment on (1) the proposal to require cable operators that do not meet the prevailing company price test to value services at the higher of cost and fair market value when the cable operator is the seller and the lower of

cost and fair market value when the cable operator is the buyer;[46*] (2) whether the current definition of an affiliate should be retained;[47*] (3) whether the interim cable affiliate transaction rules should be adopted as our final rules;[195] and (4) whether our final cable affiliate transaction rule should be included in the uniform system of accounts that we adopted for cable operators.[196] We will address these issues in conjunction with our general consideration of final cost rules in MM Docket No. 93-215 at a later time.

VIII. Seventh Notice of Proposed Rulemaking

132. As discussed above,[197] we have determined that operators electing to use the 20 cent per channel adjustment may not take the 7.5% mark-up on programming cost increases, including retransmission consent fees and copyright fees incurred for carriage of broadcast signals, for channels added on or after May 15, 1994. We made this determination because our analysis indicates that the 20 cent per channel adjustment will provide full and fair compensation to operators adding new channels to CPSTs.

133. We also believe that for operators using the per channel adjustment of up to 20 cents, maintaining the 7.5% mark-up on programming cost increases for channels offered before May 15, 1994 may no longer be necessary given the total incentive structure provided in our revised going forward rules. In addition, the 7.5% mark-up on such channels may create an artificial incentive for the operator to continue to offer programming that the operator would not otherwise continue to offer. For these reasons, we tentatively conclude that the 7.5% mark-up is unnecessary for such operators with respect to increases in programming costs for channels offered before May 15, 1994. We solicit comment on whether operators electing to use the per channel adjustment of up to 20 cents under the new rules should be allowed to take the 7.5% mark-up on increases in programming costs, including retransmission consent fees and copyright fees incurred for carriage of broadcast signals, for channels added before May 15, 1994. If we decide that such operators may not take a 7.5% mark-up on increases in programming costs, we will not consider requiring cable operators to prospectively remove from rates any 7.5% mark-up added prior to the effective date of a final rule on this issue.

[46*] This proposal would change the requirement under our existing rule which provides that affiliate transactions that do not meet the prevailing company price test and involve the sale of services shall be recorded at cost. *See Cost Further Notice* at para. 312.

[47*] Under the current definition, an entity is affiliated with a cable system operator when it has a five percent or greater ownership interest in the cable system operator. This definition also specifies that a cable system operator is affiliated with another entity when it has a five percent or greater interest in that entity and that two companies that do not own each other are affiliated when a single entity has a five percent or greater interest in each of the two companies. *See Cost Further Notice* at paras. 242-248, 313 n.577.

134. We believe that the 7.5% mark-up on new programming costs when channels are initially added to a system ought be preserved for systems that continue to use the existing going forward rules because the 7.5% mark-up is an important part of the total package of incentives to add new programming under the existing rules.[48*] Our rules permitting operators to pass through external costs are generally intended to compensate for added costs outside the operators' control and not to provide an additional mark-up without a clear policy purpose. In contrast to the situation where the goal of providing incentives to add new programming services justifies a mark-up, there appears to be no strong reason to allow a mark-up on programming cost increases for a service already being offered. We therefore solicit comment on whether operators electing to use the current going forward rules should be permitted to pass-through the 7.5% mark-up on programming cost increases after the initial mark-up on the programming cost of new channels. We will not, however, consider prospectively removing from rates any 7.5% mark-up that was reflected in rates prior to our reaching a decision on this issue.

IX. Regulatory Flexibility Act Analysis

A. Final Analysis for the Fifth Report and Order and Sixth Order on Reconsideration.

134. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-612, the Commission's final analysis with respect to the *Sixth Order on Reconsideration and Fifth Report and Order* is as follows:

135. Need and purpose of this action. The Commission, in compliance with § 3 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 543 (1992), pertaining to rate regulation, adopts revised rules and procedures intended to ensure that cable services are offered at reasonable rates with minimum regulatory and administrative burdens on cable entities.

136. Summary of issues raised by the public in response to the Initial Regulatory Flexibility Analysis. There were no comments submitted in response to the Initial Regulatory Flexibility Analysis. The Chief Counsel for Advocacy of the United States Small Business Administration (SBA) filed comments in the original rulemaking order. The Commission addressed the concerns raised by the Office of Advocacy in the *Rate Order*. The SBA also filed reply comments in response to the *Fifth Notice*.

[48*] We note that the Commission did not directly adopt the 7.5% mark-up on increases in programming costs of channels offered before May 15, 1994, and that the mark-up on increases in programming costs was added when the Cable Services Bureau developed the FCC Form 1210 to implement the Commission's Order.

137. Significant alternatives considered and rejected. Petitioners representing cable interests and franchising authorities submitted several alternatives aimed at minimizing administrative burdens. In the course of this proceeding, the Commission has attempted to accommodate the concerns expressed by these parties. For example, the revised going forward mechanisms are designed to enhance incentives to add new channels to regulated tiers without creating new regulatory burdens and to provide additional options tailored to the concerns of small systems. In addition, the New Products Tier is designed to ensure that regulated cable service rates are reasonable while reducing administrative burdens.

B. Initial Regulatory Flexibility Analysis for the Seventh Notice of Proposed Rulemaking.

138. Pursuant to Section 603 of the Regulatory Flexibility Act, the Commission has prepared the following initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of the *Notice*, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq*. (1981).

139. Reason for action. The Cable Television Consumer Protection and Competition Act of 1992 requires the Commission to prescribe rules and regulations for determining reasonable rates for basic tier cable service and to establish criteria for identifying unreasonable rates for cable programming services. The Commission has adopted rate regulations for cable systems not subject to effective competition. This *Notice* proposes to revise regulations governing new programming costs for channels on a system before May 15, 1994.

140. Objectives. To propose rules to implement Section 3 of the Cable Television Consumer Protection and Competition Act of 1992. We also desire to adopt rules that will be easily interpreted and readily applicable and, whenever possible, minimize the regulatory burden on affected parties.

141. Legal Basis. Action as proposed for this rulemaking is contained in Sections 4(i), 4(j), 303(r) and 623 of the Communications Act of 1934, as amended.

142. Description, potential impact and number of small entities affected. We anticipate a possible impact on small entities because the *Notice* addresses the rates charged by cable operators that are not subject to effective competition, including small systems.

143. Reporting, record keeping and other compliance requirements. None.

144. Federal rules which overlap, duplicate or conflict with this rule. None.

145. Any significant alternatives minimizing impact on small entities and consistent with stated objectives. None.

X. Paperwork Reduction Act

146. The requirements adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

XI. Procedural Provisions

147. *Ex parte* Rules - Non-Restricted Proceeding. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

148. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before January 13, 1995 and reply comments on or before February 13, 1995. To file formally in this proceeding, you must file an original plus four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments and reply comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W. Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, Federal Communications Commission, 1919 M Street N.W., Washington D.C. 20554.

XII. Ordering Clauses

149. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 303 (r), 612, 622(c) and 623 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), 532, 542(c) and 543, the rules, requirements and policies discussed in this Sixth Order on Reconsideration and Fifth Report and Order, ARE ADOPTED and Part 76 of the Commission's rules, 47 C.F.R. Part 76, IS AMENDED as set forth in Appendix C.

150. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 4(j), 303(r), 612(c), 622(c) and 623 of the Communications Act of 1934, 47 U.S.C. §§ 154 (i), 154 (j), 303(r),

532 (c), 542(c), and 543, NOTICE IS HEREBY GIVEN of proposed amendments to Part 76, in accordance with the proposals, discussions, and statement of issues in this Seventh Notice of Proposed Rulemaking, and that COMMENT IS SOUGHT regarding such proposals, discussion, and statement of issues.

151. IT IS FURTHER ORDERED that the Secretary shall send a copy of this Report and Order, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 *et seq.* (1981).

152. IT IS FURTHER ORDERED that the requirements and regulations established in this decision shall become effective January 1, 1995, with the exception of new reporting requirements which will become effective on that date or as soon thereafter as they may be approved by the Office of Management and Budget.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

ENDNOTES

1. Pub. L. No. 102-385, 106 Stat. 1460 (amending the Communications Act of 1934 (the "Communications Act") and codified at 47 U.S.C. § 151, *et. seq.*).

2. *See Report and Order and Further Notice of Proposed Rulemaking ("Rate Order")*, MM Docket No. 92-266, 8 FCC Rcd 5631, 58 FR 29736 (1993) at para. 2; 1992 Cable Act § 2(b)(4), 106 Stat. at 1463.

3. We have released the following documents in Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation: *Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 510 (1992) (*Rate Notice*); *Order*, MM Docket No. 92-266, 8 FCC Rcd 226 (1992) (*Survey Order*); *Order*, MM Docket No. 92-266, , 8 FCC Rcd 2921 (1993) (*Rate Freeze Order*); *Order*, MM Docket No. 92-266, 58 Fed. Reg. 19626 (Apr. 15, 1993) (*Rate Freeze Clarification Order*); *Order Denying Stay*, MM Docket No. 92-266, 8 FCC Rcd 2917 (1993) (*Freeze Stay Order*); *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631 (1993) (*Rate Order*); *Order Denying Stay*, MM Docket No. 92-266, 8 FCC Rcd 3652 (1993) (*Effective Date Order*); *Order*, MM Docket No. 92-266, 58 Fed. Reg. 33560 (June 18, 1993), *Erratum*, 8 FCC Rcd 4511 (1993) (*Freeze Extension Order*); *Order*, MM Docket No. 92-266, 58 Fed. Reg. 41042 (Aug. 2, 1993) (*Effective Date Extension Order*); *Notice of Proposed Rulemaking*, MM Docket No. 93-215, 58 Fed. Reg. 40762 (July 30, 1993) (*Cost Notice*); *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5585 (1993) (*Small System Further Notice*); *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*,MM Docket No. 92-266, 9 FCC Rcd 1164 (1993) (*First Recon. Order*); *Third Report and Order*, MM Docket No. 92-266, 8 FCC Rcd 8444 (1993) (*Third Order*); *Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, 58 Fed. Reg. 46737 (Sept. 2, 1993) (*Going Forward Further Notice*); *Order*, MM Docket No. 92-266, 58 Fed. Reg. 60141 (Nov. 15, 1993) (*Freeze Extension Order*); *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, 9 FCC Rcd 4119 (1994) (*Second Recon. Order or Fourth Report and Order or Fifth Notice*); *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket Nos. 92-266, 93-215, 9 FCC Rcd 4527 (1994) (*Cost Order or Cost Further Notice*); *Third Order on Reconsideration*,MM Docket Nos. 92-266, 92-262, 9 FCC Rcd 4316 (1994) (*Third Recon. Order*); *Fifth Order on Reconsideration and Further Notice of Proposed Rulemaking*, MM Docket Nos. 92-266, 93-215, FCC 94-234, 59 FR 51869 (adopted Sept. 12, 1994 and released Sept. 26, 1994) (*Fifth Recon. Order*); *Fourth Order on Reconsideration*, MM Docket No. 92-266, FCC 94-254, 59 FR 53113 (adopted Sept. 30, 1994 and released Oct. 5, 1994) (*Fourth Recon. Order*) .

4. See *Fifth Notice* at paras. 255-56.

5. *See* 1992 Cable Act §§ 2(a)(2), (5), 106 Stat. at 1460; *See also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, First Report ("Competition Report")*, CS Docket No. 94-48, FCC 94-235 (adopted Sept. 19, 1994 and released Sept. 28, 1994).

6. 1992 Cable Act, § 2(b), 106 Stat. 1463.

7. 1992 Cable Act § 2(b), 106 Stat. at 1463.

8. Communications Act § 623(f), 47 U.S.C. 543(f).

9. *Cost Further Notice* at para. 309, *citing* 8 FCC Rcd 8071 (1993) (Telco Notice).

10. *See* 1992 Cable Act § 2(b), 106 Stat. at 1463.

11. *Id.*

12. Communications Act § 623(c)(1)(C), 47 U.S.C. 543(c)(1)(C).

13. Communications Act § 623(c)(2), 47 U.S.C. 543(c)(2).

14. *Id.*

15. *Rate Order* at para. 387.

16. *Id.*

17. *Id.* at para. 14 n.29, para. 387 n.946.

18. *Id.* at para. 387 n.946.

19. *See id.* at paras. 262-264.

20. *Id.* at para. 396.

21. *Id.*

22. *Id.* at para. 397; *See also Second Recon. Order* at paras. 109-110.

23. *Second Recon. Order at* paras. 109-110.

24. *See* 47 C.F.R. § 76.922(b)(4).

25. 1992 Cable Act § 2(b), 106 Stat. at 1463.

26. 47 C.F.R. § 76.922(d).

27. *Id.* at § 76.922(e).

28. *Id.* at § 76.922(d)(3)(xi).

29. *See, e.g.*, Letter from Turner Broadcasting System, Inc. to Reed E. Hundt, Chairman, FCC (October 5, 1994); Letter from Arts & Entertainment Network to James Quello, Commissioner, FCC (May 17, 1994); Letter from Cablevision to Reed Hundt, Chairman, FCC (February 10, 1994).

30. *Id.*

31. *See, e.g.*, Letter from Lifetime Television (September 28, 1994) in response to the Commission's Request for Information (September 19, 1994).

32. *See, e.g.*, Providence Journal Company, Sammons Communications Inc., Multivision Cable TV Corp., and Parcable, Inc. Comments to Fifth Notice at 8-9; Arts & Entertainment and ESPN Comments on Petition for Recon. at 20.

33. *See, e.g.,ex parte* letter from Turner Broadcasting System, Inc. to Reed Hundt, Chairman, FCC (October 5, 1994); *ex parte* letter from Cox Cable Communications to Reed Hundt, Chairman, FCC (October 20, 1994); *ex parte* letter from Newhouse Broadcasting Corporation to Kathleen Wallman, FCC (September 16, 1994).

34. 1992 Cable Act, § 3(c)(l)(2).

35. Communications Act § 623(c)(1)(A), 47 U.S.C. 543(c)(1)(A).

36. Communications Act § 623(c)(2), 47 U.S.C. 543(c)(2).

37. Communications Act § 623(l)(2), 47 U.S.C. § 543(l)(2).

38. *Rate Order* at paras. 326-328.

39. *Id.* at para. 328 n.808.

40. *Id.*

41. *See Second Recon.Order* at para. 192; *see also Rate Order* at para. 329.

42. *Id.* at para. 193.

43. *Id.* at para. 194.

44. *See Second Recon. Order* at paras. 195-196.

45. *Id.* at para. 195 n.263

46. *Id.* at para. 200.

47. NCTA Comments on Fifth Notice at 12-14, Reply Comments at 4-5; Arts & Entertainment and ESPN Comments on Petitions for Recon. at 19-20; Court TV Comments on Fifth Notice at 16; Discovery Communications Comments on Fifth Notice at 10-11; E! Entertainment Television Comments on Fifth Notice at 4-5; Lifetime Television reply Comments at 8; Providence Journal *et al.* Comments on Fifth Notice at 8; Time Warner Reply Comments at 7; Tele-Communications, Inc. ("TCI") Comments on Fifth Notice at 14-15; Viacom Comments on Fifth Notice at 10-11; and Newhouse Broadcasting Corporation reply Comments at 3.

48. Ovation, Inc and PBS Horizons Network ("Programming Providers") Comments on Fifth Notice at 20-22.

49. NCTA Comments on Fifth Notice at 13.

50. *Id. at 14.*

51. Viacom Comments on Fifth Notice at 10-11.

52. *See* Discovery Communications Comments on Fifth Notice at 10-11.

53. *Henslee v. Union Planters Nat'l Bank & Trust Co. et al.*, 335 U.S. 595, 600 (1949) (dissenting opinion).

54. *Rate Order* at para. 329.

55. S. Rep. No. 92, 102d Cong., 1st Sess. 77 (1991).

56. *Id.* at 19-20.

57. H.R. Rep. No. 628, 102d Cong., 2d Sess. 79 (1992) *accord* at 90 (cable programming service excludes "programming offered on a stand-alone, per channel basis (such as HBO and Showtime and some regional sports channels)").

58. Adelphia Cable Partners, L.P. South Dade County, Florida, LOI-93-42, DA-94-1277 (adopted and released November 18, 1994).

59. *See id.*, Warner Cable Communications, L.P. Milwaukee, Wisconsin, LOI-93-14, DA-94-1276 (adopted and released November 18, 1994), Comcast Cablevision, City of Tallahassee, Florida, LOI-93-2, DA 94-1275 (adopted and released November 18, 1994).

60. 114 S. Ct. 2223 (1994).

61. 395 U.S. 258 (1969).

62. *Solorio v. United States*, 483 U.S. 435, 445 (1987).

63. 401 U.S. 355 (1971).

64. *Solorio*, 483 U.S. at 448.

65. *Id.* at 450.

66. Codified at 47 U.S.C. § 543.

67. *See Rate Order* at para. 187; *Cost Order*.

68. *See Rate Order* at paras. 227, 396; 47 C.F.R. §§ 76.922(c),(d),(e).

69. *See id.* at para. 239; 47 C.F.R. §76.922(d)(2).

70. *See Fourth Report* at paras. 246-249.

71. *Id.* at para. 246 n. 345.

72. *See Fifth Notice* at paras. 255-256.

73. *See, e.g.*, Viacom International, Inc. (Viacom) Petition for Recon. at 2-7; United Video Petition for Recon. at 8; Eternal World Television Network Petition for Recon. at 2-6; Public Interest Petitioners Petition for Recon. at 9-11, 15; and Office of the Commissioner of Baseball Petition for Recon. at 1-3.

74. Time Warner Comments on Fifth Notice at 3-4; Viacom Petition for Recon. at 5-7; *accord* National Cable Television Association ("NCTA") Comments on Fifth Notice at 6-7.

75. *See, e.g.*, Viacom Petition for Recon. at 6.

76. *See, e.g.*, Continental Cablevision Response to Petitions for Recon. at 8.

77. *See, e.g.*, USA Networks Comments on Fifth Notice at 8-9; United Video Petition for Recon. at 8.

78. USA Networks Comments on Fifth Notice at 11.

79. Letter from Bradley Stillman, Consumer Federation of America to Reed E. Hundt, Chairman, FCC (August 25, 1994).

80. *See, e.g.*, Providence Journal et al. Comments on Fifth Notice at 4-5; Cablevision Industries Comments on Fifth Notice at 10-14; Time Warner Comments on Fifth Notice at 4-6; TCI Comments on Fifth Notice at 21-23; Liberty Media Corporation Reply Comments on Fifth Notice at 6-8; Viacom Petition for Recon. at 2; Public Interest Petitioners Petition for Recon. at 11-13; United Video Petition for Recon. at 8; and Continental Cablevision Response

to Petitions for Recon. at 7.

81. *See, e.g.*, C-SPAN Comments on Fifth Notice at 1-6; NCTA Comments on Fifth Notice at 7-8; *see also* E! Entertainment Television Comments on Fifth Notice at 3; Programming Providers Comments on Fifth Notice at 8-9; The Inspirational Network Reply Comments on Fifth Notice at 3; Lifetime Television Reply Comments on Fifth Notice at 6-8; Eternal World Television Network Petition for Recon. at 2-3; and Arts & Entertainment and ESPN Comments in Support of Petitions for Recon. at 8.

82. *See, e.g.*, C-SPAN Comments on Fifth Notice at 4-5.

83. *See, e.g.*, NCTA Comments on Fifth Notice at 7; Programming Providers Comments on Fifth Notice at 8-9, *accord*, Lifetime Television Reply Comments on Fifth Notice at 3-4; and Continental Cablevision Response to Petitions for Recon. at 7.

84. Public Interest Petitioners Petition for Recon. at 6; *accord* United Church of Christ Reply to Comments on Petitions for Recon. at 2; and Letter from Black Citizens for a Fair Media, to William Caton, Acting Secretary, FCC (May 20, 1994).

85. *See, e.g.*, Cablevision Industries Comments on Fifth Notice at 10-14; Time Warner Comments on Fifth Notice at 4-6; Court TV Comments on Fifth Notice at 8-9; Discovery Communications, Inc. Comments on Fifth Notice at 6; Programming Providers Comments on Fifth Notice at 4-6; USA Networks Comments on Fifth Notice at 2, 4; Viacom Petition for Recon. at 2-3; United Video Petition for Recon. at 8; Continental Cablevision Response to Petitions for Recon. at 8; A&E and ESPN Comments in Support of Petitions for Recon. at 14-15; and Letter from Reynaldo Ortiz, Jones Education Networks, to Reed E. Hundt, Chairman, FCC (June 29, 1994) (Jones Education Networks Letter) at 3-4.

86. *See, e.g.*, Cablevision Industries Comments on Fifth Notice at 7-8; NCTA Comments on Fifth Notice at 7; Discovery Communications, Inc. Comments on Fifth Notice at 6-7.

87. *See, e.g.*, Time Warner Comments on Fifth Notice at 4-7; Programming Providers Comments on Fifth Notice at 4-5.

88. *See, e.g.*, Court TV Comments on Fifth Notice at 8-9; *accord*, C-SPAN Comments at 9-10; USA Networks Comments on Fifth Notice at 2; and Public Interest Petitioners Petition for Recon. at 12.

89. *E.g.*, Letter from Black Entertainment Television to Reed Hundt, FCC Chairman (October 24, 1994); Letter from Discovery Communications Inc. to Reed Hundt, FCC Chairman (October 13, 1994); Letter from Arts & Entertainment Network to Reed Hundt, Chairman, FCC (October 12, 1994); Letter from Lifetime Television to Chief Cable Services Bureau (October 13, 1994).

90. Economists' Inc. Study (appended to NCTA Reply Comments on Fifth Notice and stating at page 6 that 30 cents would be a conservative measure of opportunity costs); Charles River Associates Study (appended to TCI Comments on Fifth Notice and suggesting a mark-up on the order of 25 cents at page 13). Several commenters agree with a flat per channel charge approach, generally advocating 25 cents except where indicated: E! Entertainment Television Comments on Fifth Notice at 3; Cablevision Industries Comments on Fifth Notice at 13-14 (35-40 cents); Court TV Comments on Fifth Notice at 15; Discovery Communications, Inc. Comments on Fifth Notice at 7 (however, no flat fee mark-up for home shopping networks or pay-per-view channels); Programming Providers Comments on Fifth Notice at 11-12; USA Networks Comments on Fifth Notice at 9-10; Lifetime Television Reply Comments on Fifth Notice at 5; The Inspirational Network Reply Comments on Fifth Notice at 4 (7 cents); Liberty Media Corporation Reply Comments on Fifth Notice at 7 (35-40 cents); Eternal World Television Network Petition for Recon. at 5; Arts & Entertainment and ESPN Comments in Support of Petitions for Recon. at 9 (30 cents); Letter dated June 16, 1994 from Fox Basic Cable, Inc. at 2; and Jones Education Networks Letter at 6 (30 cents).

91. *See, e.g.*, Time Warner Comments on Fifth Notice at 6-7; Discovery Communications, Inc. Comments on Fifth Notice at 9-10; and Arts & Entertainment Comments in Support of Petitions for Recon. at 9-12;

92. *See, e.g.*, TCI Comments on Fifth Notice at 25-26.

93. *See, e.g.*, Continental Cablevision Response to Petitions for Recon. at 10-12.

94. Cablevision Industries Comments on Fifth Notice at 13-14; *accord* Discovery Communications, Inc. Comments on Fifth Notice at 7-8.

95. Cablevision Industries Comments on Fifth Notice at 11.

96. *Id.* at 14.

97. *Id.*

98. CATA Comments on Fifth Notice at 4-5.

99. Viacom Comments on Fifth Notice at 9-10; *accord* Lifetime Television Reply Comments on Fifth Notice at 8.

100. TCI Reply Comments on Fifth Notice at 6 (annual cap causes delay in or abandonment of launch of new services).

101. *See, e.g.*, Liberty Media Corporation Reply Comments on Fifth Notice at 7-8; Affiliated Regional Communications Reply Comments on Fifth Notice at 14-18.

102. *See* paras. 88-90, infra.

103. *Ex parte* letter from Susan Littlefield, The National Association of Telecommunications Officers and Advisors ("NATOA") to Reed Hundt, Chairman, FCC (October 19, 1994).

104. *Id.*

105. *Id.*

106. *Id.*

107. *See* Letter from the City of St. Louis, Missouri, to Reed Hundt, Chairman, FCC (October 21, 1994).

108. *See* Letter from the Consumer Federation of America, to Reed Hundt, Chairman, FCC (August 25, 1994).

109. *See* Letter from the City of St. Louis, Missouri, to Reed Hundt, Chairman, FCC (October 21, 1994).

110. *See Fourth Report* at paras. 239-249; 47 C.F.R. § 76.922(e).

111. *See* Communications Act § 623(c), 47 U.S.C. § 543(c).

112. *See* para. 83, *infra.*

113. *Id.*

114. *See Rate Order* at para. 387.

115. *See Rate Order* at paras. 196-197.

116. *See* Letter from NATOA to Reed Hundt, Chairman, FCC (October 19, 1994).

117. *Rate Order* at para. 253 n.602.

118. *See* para. 85, *infra.*

119. *See* 47 C.F.R. §§ 76.932, 76.933, 76.958, 76.964.

120. *See generally*, Letter from the Consumer Federation of America to Reed Hundt, Chairman, FCC (October 28, 1994); Letter from the National Association of Telecommunications Officers and Advisors ("NATOA") to Reed Hundt, Chairman, FCC (October 19, 1994); Letter from the City of St. Louis, Missouri, to Reed Hundt, Chairman, FCC (October 11, 1994).

121. *See* para. 73, *infra.*

122. Facsimile from Steven Brill, Courtroom Television Network to Blair Levin, Chief of Staff, FCC (October 7, 1994).

123. *See* 47 C.F.R. §§ 76.922(d)(3)(i), (ii).

124. *See Second Recon. Order* at paras. 117-122, 201-221; *Fifth Recon. Order* at paras. 6-8.

125. *See* CATA Comments on Fifth Notice at 7.

126. *See id.* at 6.

127. *See id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *See* Summit Communications, Inc. Comments on Fifth Notice at 1.

132. *See id.* at 2.

133. *Fifth Notice* at para. 255.

134. *Id.* at para. 256.

135. *See* CATA Comments on Fifth Notice at 5.

136. *See* Time Warner Comments on Fifth Notice at 25-26.

137. *See* Providence Journal Comments on Fifth Notice at 9.

138. *See* TCI Comments on Fifth Notice at 30-32.

139. *See* GTE Comments on Fifth Notice at 6-7.

140. Communications Act § 623(f), 47 U.S.C. § 543(f).

141. *Id.*

142. *Rate Order* at para. 440.

143. *Id.*

144. *Id.*

145. *Id.* at para. 441.

146. *Id.* at para. 442.

147. *Id.* at paras. 236-57.

148. *Third Order on Reconsideration ("Third Recon. Order")*, MM Docket No. 92-262, 9 FCC Rcd 4316 (1994) at para. 128.

149. Communications Act § 632(c)(1), 47 U.S.C. § 552(c)(1). *See also id.* at para. 128.

150. *Id.*

151. *Id.* at para. 129.

152. *Id.* at para. 131.

153. Time Warner Comments on Fifth Notice at 16, 22; NCTA Comments on Fifth Notice at 10-11.

154. *Rate Order* at paras. 440-442.

155. NCTA Letter at 5.

156. *Id.*

157. *Id.*

158. *Id.*

159. H.R. Rep. No. 102-862, 102d Cong., 2d Sess. 65 (1992).

160. *Rate Order* at para. 440.

161. *Rate Order* at paras. 236-57.

162. *Id.* at para. 440.

163. *Id.*

164. *Id.* at para. 440 n.1100.

165. *Id.* at para. 440; *see also* 47 C.F.R. §§ 76.309(c)(3)(i)(B)(regarding advance notification to customers of any changes in rates, programming services or channel positions; 76.964(b) (requiring 30 days notice before any changes in rates for cable programming service or associated equipment).

166. *Third Recon. Order* at para. 128.

167. *Third Recon. Order* at para. 131.

168. *Id.*

169. *See, e.g., Free v. Bland*, 369 U.S. 663 (1962); *Hines v. Davidowitz*, 312 U.S. 52 (1941).

170. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) (the enforcement provisions of the Employee Retirement Income Security Act of 1974 (ERISA) preempt the field).

171. *See* 1992 Cable Act §§ 3(b)(1), 3(c)(1)(A).

172. 47 C.F.R. § 76.922(d)(3)(i).

173. 47 C.F.R. § 76.981.

174. *Third Recon. Order* at para. 131.

175. *Id.*

176. MM Docket No. 93-215 and CS Docket No. 94-28, 9 FCC Rcd 4527 (1994).

177. *Cost Order* at para. 249.

178. *Id.*

179. 47 C.F.R. §§ 76.924(i)(1)-(2).

180. *Id.* at § 76.924(i)(1).

181. *Id.*

182. *Id.* at §§ 76.924(1)(3)-(4).

183. *Cost Further Notice* at para. 310.

184. *Id.*

185. *Id.* at paras. 310-311.

186. TCI Comments on Cost Further Notice at 49. Time Warner Comments on Cost Further Notice at 27-28.

187. BellSouth Comments on Cost Further Notice at 4-7.

188. Turner Broadcasting System Comments on Cost Further Notice at 1-3; *See also* Discovery Comments on Cost Further Notice at 2-4; Jones Comments on Cost Further Notice at 3-7; Liberty Comments on Cost Further Notice at 18-22; Comcast Reply Comments on Cost Further Notice at 18.

189. *See, e.g.,* Turner Broadcasting System Comments on Cost Further Notice at 8-11; Rainbow Comments on Cost Further Notice at 4-5; Discovery Comments on Cost Further Notice at 5-7; Jones Comments on Cost Further Notice at 7-9.

190. *See, e.g.*, Fred Williamson and Associates Comments on Cost Further Notice at 3.

191. Bell Atlantic Comments on Cost Further Notice at 9-11. In its Reply Comments on Cost Further Notice, Bell Atlantic argues that regulatory parity dictates that similar rules in cable and telephony. *Id.* at 14-16.

192. USTA Reply Comments on Cost Further Notice at 3-5.

193. NCTA Reply Comments on Cost Further Notice at 61-63.

194. *See, e.g.,* Turner Broadcasting System Comments on Cost Further Notice at 11.

195. *Cost Further Notice* at para. 313.

196. *Id.*

197. *See* para. 83 *infra.*

APPENDIX A

Petitions for Reconsideration in MM Docket 92-266
Bell Atlantic
Commissioner of Baseball
Eternal Word Television
National Association of Telecommunications Officers and Advisors Et. Al. ("NATOA")
Public Interest Petitioners
United Video
Viacom International (also errata)

Comments/Oppositions to Petitions For Reconsideration in MM Docket 92-266
Arts & Entertainment and ESPN (also errata)
Bell Atlantic
City of Detroit
Continental Cablevision
Discovery Communications, Inc.
Fox Basic
GTE Service Corporation
Liberty Media
National Association of Telecommunications Officers and Advisors and the City of New York
National Cable Television Association
Time Warner Entertainment Co., L.P.
Viacom International

Replies to Comments/Oppositions to Petitions for Reconsideration in MM Docket 92-266
Bell Atlantic
City of Detroit
GTE Service Corporation
United Church
Public Interest Petitioners

Comments to Fifth Notice of Proposed Rulemaking in MM Docket 92-266
Affiliated Regional Communications, Inc.
Cable Telecommunications Association
Cablevision Industries Corporation
Cablevision Systems Corporation
Continental Cablevision, Inc.
Court TV
Discovery Communications, Inc.
E! Entertainment Co.
GTE Service Corporation
Jones Education Networks
Liberty Media Corporation

National Cable Satellite Network d/b/a C-SPAN
Lifetime Television
National Cable Television Association
National Hockey League
Pagosa Vision, Inc.
Programming Providers - Ovation, Inc. and PBS Horizons Cable Network
Providence Journal Company Et. Al.
Rainbow Programming Holdings, Inc.
Small Cable Business Association (also errata)
Tele-Communications, Inc.
The Times Mirror Company
Time Warner Cable
Turner Broadcasting System, Inc.
USA Networks
Viacom International, Inc.

Reply Comments to Fifth Notice of Proposed Rulemaking in MM Docket 92-266
Affiliated Regional Communications, Inc.
Commissioner of Baseball
The Inspirational Network
Liberty Cable Company, Inc.
Liberty Media Corporation
Lifetime Television
National Cable Television Association
National Hockey League
New England Sports
Newhouse Broadcasting Corporation
Sammons Communications Inc. and TCA Cable TV Inc.
Small Cable Business Association
Summit Communications, Inc.
Tele-Communications, Inc.
Time Warner Cable
USA Networks
Viacom International, Inc.

Comments to Further Cost Notice in MM Docket No. 93-215
Bell Atlantic
BellSouth Corporation and BellSouth Telecommunications, Inc.
Discovery
Jones Education Networks, Inc.
National Cable Television Association
Rainbow Programming Holdings, Inc.
Tele-Communications, Inc.
Time Warner Entertainment Company, L.P.
Turner Broadcasting Systems, Inc.
Fred Williamson & Associates, Inc.

Reply Comments to Further Cost Notice in MM Docket No. 93-215
Bell Atlantic
Comcast Cable Communication, Inc.
Liberty Media Corporation
United States Telephone Association

APPENDIX B

Title 47, Part 76 of the Code of Federal Regulations is amended as follows:

PART 76 -- CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat. as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 1101; 47 U.S.C. Secs. 152, 153, 154, 301, 303, 307, 308, 309, 532, 535, 542, 543, 552 as amended, 106 Stat. 1460.

2. Section 76.901 is amended to add paragraphs (d) and to read as follows:

Section 76.901 Definitions

* * * * *

(d) New Product Tier. A new product tier ("NPT") is a cable programming service tier meeting the conditions set forth in Section 76.987 of this Subpart.

3. Section 76.922 is amended to revise paragraphs (d)(3)(x), (d)(3)(xi) and (e) to read as follows:

Section 76.922 Rates for the basic service tier and cable programming service tiers.

* * * * *

(d)(3)(x) Adjustments to permitted charges on account of increases in costs of programming shall be further adjusted to reflect any revenues received by the operator from the programmer. Such adjustments shall apply on a channel-by-channel basis.

(d)(3)(xi) In calculating programming expense, operators may add a mark-up of 7.5% for increases in programming costs occurring after March 31, 1994, except that operators may not file for or take the 7.5% mark-up on programming costs for new channels added on or after May 15, 1994 for which the operator has used the methodology set forth in paragraph (e)(3) for adjusting rates for channels added to cable programming service tiers. Operators shall reduce rates by decreases in programming expense plus an additional 7.5% for decreases occurring after May 15, 1994 except with respect to programming cost decreases on channels added after May 15, 1994 for which the rate adjustment methodology in paragraph (e)(3) was used.

(e) Changes in the number of channels on regulated tiers.

(1) Generally. A system may adjust the residual component of its permitted rate for a tier to reflect changes in the number of channels offered on the tier on a quarterly basis. Cable systems shall use FCC Form 1210 (or FCC Form 1211, where applicable) to justify rate changes made on account on changes in the number of channels on a basic service tier ("BST") or a cable programming service tier ("CPST"). Such rate adjustments shall be based on any changes in the number of regulated channels that occurred from the end of the last quarter for which an adjustment was previously made through the end of the quarter that has most recently closed preceding the filing of the FCC Form 1210 (or FCC Form 1211, where applicable). However, when a system deletes channels in a calendar quarter, the system must adjust the residual component of the tier charge in the next calendar quarter to reflect that deletion. Operators must elect between the channel addition rules in paragraphs (2) and (3) the first time they adjust rates after December 31, 1994, to reflect a channel addition to a CPST that occurred on or after May 15, 1994, and must use the elected methodology for all rate adjustments through December 31, 1997. A system that adjusted rates after May 15, 1994, but before January 1, 1995 on account of a change in the number of channels on a CPST that occurred after May 15, 1994, may elect to revise its rates to charge the rates permitted by paragraph (3) on or after January 1, 1995, but is not required to do so as a condition for using the methodology in paragraph (e)(3) for rate adjustments after January 1, 1995. Rates for the BST will be governed exclusively by paragraph (2), except that where a system offered only one tier on May 14, 1994, the cable operator will be allowed to elect between paragraphs (2) and (3) as if the tier was a CPST.

(2) Adjusting Rates for increases in the number of channels offered between May 15, 1994, and December 31, 1997, on a basic service tier and at the election of the operator on a cable programming service tier. The following table shall be used to adjust permitted rates for increases in the number of channels offered between May 15, 1994, and December 31, 1997, on a basic service tier and subject to the conditions in paragraph (1) at the election of the operator on a CPST. The entries in the table provide the cents per channel per subscriber per month by which cable operators will adjust the residual component using FCC Form 1210 (or FCC Form 1211, where applicable).

Average Number of Regulated Channels	Per-Channel Adjustment Factor	Average Number of Regulated Channels	Per-Channel Adjustment Factor
7	$0.52	14	0.14
7.5	0.45	14.5	0.13
8	0.40	15-15.5	0.12
8.5	0.36	16	0.11

9	0.33	16.5-17	0.10
9.5	0.29	17.5-18	0.09
10	0.27	18.5-19	0.08
10.5	0.24	19.5-21.5	0.07
11	0.22	22-23.5	0.06
11.5	0.20	24-26	0.05
12	0.19	26.5-29.5	0.04
12.5	0.17	30-35.5	0.03
13	0.16	36-46	0.02
13.5	0.15	46.5 -99.5	0.01

In order to adjust the residual component of the tier charge when there is an increase in the number of channels on a tier, the operator shall perform the following calculations: (1) take the sum of the old total number of channels on tiers subject to regulation (i.e., tiers that are, or could be, regulated but excluding New Product Tiers) and the new total number of channels and divide the resulting number by two; (2) consult the above table to find the applicable per channel adjustment factor for the number of channels produced by the calculations in step (1). For each tier for which there has been an increase in the number of channels, multiply the per-channel adjustment factor times the change in the number of channels on that tier. The result is the total adjustment for that tier.

(3) Alternative methodology for adjusting rates for changes in the number of channels offered on a cable programming service tier or a single tier system between May 15, 1994, and December 31, 1997. This paragraph at the Operator's discretion as set forth in paragraph (1) shall be used to adjust permitted rates for a CPST after December 31, 1994, for changes in the number of channels offered on a CPST between May 15, 1994, and December 31, 1997. For purposes of this paragraph (3), a single tier system may be treated as if it were a CPST.

(i) Operators Cap Attributable to New Channels on All CPSTs Through December 31, 1997. Operators electing to use the methodology set forth in this paragraph may increase their rates between January 1, 1995, and December 31, 1997, by up to 20 cents per channel, exclusive of programming costs, for new channels added to CPSTs on or after May 15, 1994, except that they may not make rate adjustments totalling more than $1.20 per month, per subscriber through December 31, 1996, and by more than $1.40 per month, per subscriber through December 31, 1997 (the "Operator's Cap"). Except to the extent that the programming costs of such channels are covered by the License Fee Reserve provided for in

subsection (iii) of this paragraph (3), programming costs associated with channels for which a rate adjustment is made pursuant to this paragraph (3) must fall within the Operator's Cap if the programming costs (including any increases therein) are reflected in rates before January 1, 1997. Inflation adjustments pursuant to Section 76.922(d)(2) of this Subpart are not counted against the Operator's Cap.

(ii) Per Channel Adjustment. Operators may increase rates by a per channel adjustment of up to 20 cents per subscriber per month, exclusive of programming costs, for each channel added to a CPST between May 15, 1994, and December 31, 1997, except that an operator may take the per channel adjustment only for channel additions that result in an increase in the highest number of channels offered on all CPSTs as compared to May 14, 1994, and each date thereafter. Any revenues received from a programmer, or shared by a programmer and an operator in connection with the addition of a channel to a CPST shall first be deducted from programming costs for that channel pursuant to paragraph (d)(3)(x) of this Section and then, to the extent revenues received from the programmer are greater than the programming costs, shall be deducted from the per channel adjustment. This deduction will apply on a channel by channel basis.

(iii) License Fee Reserve. In addition to the rate adjustments permitted in subsections (i) and (ii) of this paragraph, operators that make channel additions on or after May 15, 1994 may increase their rates by a total of 30 cents per month, per subscriber between January 1, 1995, and December 31, 1996, for license fees associated with such channels (the "License Fee Reserve"). The License Fee Reserve may be applied against the initial license fee and any increase in the license fee for such channels during this period. An operator may pass-through to subscribers more than the 30 cents between January 1, 1995, and December 31, 1996, for license fees associated with channels added after May 15, 1994, provided that the total amount recovered from subscribers for such channels, including the License Fee Reserve, does not exceed $1.50 per subscriber, per month. After December 31, 1996, license fees may be passed through to subscribers pursuant to paragraph (d) of this Section, except that license fees associated with channels added pursuant to this paragraph (3) will not be eligible for the 7.5% mark-up on increases in programming costs.

(iv) Timing. For purposes of determining whether a rate increase counts against the maximum rate increases specified in paragraphs (i) - (iii), the relevant date shall be when rates are increased as a result of channel additions, not when the addition occurs.

(4) Deletion of Channels. When dropping a channel from a BST or CPST, operators shall reflect the net reduction in external costs in their rates pursuant to paragraphs (d)(3)(i) and (ii) of this Section. With respect to channels to which the 7.5% mark-up on programming costs applied pursuant to paragraph (d(3)(xi), the operator shall treat the mark-up as part of its programming costs and subtract the mark-up from its external costs. Operators shall also reduce the price of that tier by the "residual" associated with that channel. For channels that were on a BST or CPST on May 14, 1994, or channels added after that date pursuant to paragraph (2), the per channel residual is the charge for the tier, minus the

external costs for the tier, and any per channel adjustments made after that date, divided by the total number of channels on the tier minus the number of channels on the tier that received the per channel adjustment specified in paragraph (3). For channels added to a CPST after May 14, 1994, pursuant to paragraph (3), the residuals shall be the actual per channel adjustment taken for that channel when it was added to the tier.

(5) Movement of Channels Between Tiers. When a channel is moved from a CPST or a BST to another CPST or BST, the price of the tier from which the channel is dropped shall be reduced to reflect the decrease in programming costs and residual as described in paragraph (4) above. The residual associated with the shifted channel shall then be converted from per subscriber to aggregate numbers to ensure aggregate revenues from the channel remain the same when the channel is moved. The aggregate residual associated with the shifted channel may be shifted to the tier to which the channel is being moved. The residual shall then be converted to per subscriber figures on the new tier, plus any subsequent inflation adjustment. The price of the tier to which the channel is shifted may then be increased to reflect this amount. The price of that tier may also be increased to reflect any increase in programming cost. An operator may not shift a channel for which it received a per channel adjustment pursuant to paragraph (3) from a CPST to a BST.

(6) Substitution of Channels on a BST or CPST. If an operator substitutes a new channel for an existing channel on a CPST or a BST, no per channel adjustment may be made. Operators substituting channels on a CPST or a BST shall be required to reflect any reduction in programming costs in their rates and may reflect any increase in programming costs pursuant to paragraph (d)(3)(i), (ii). If the programming cost for the new channel is greater than the programming cost for the replaced channel, and the operator chooses to pass that increase through to subscribers, the excess shall count against the License Fee Reserve or the Operator Cap when the increased cost is passed through to subscribers. Where an operator substitutes a new channel for a channel on which a 7.5% mark-up on programming costs was taken pursuant to paragraph (d)(3)(xi), the operator may retain the 7.5% mark-up on the license fee of the dropped channel to the extent that it is no greater than 7.5% of programming cost of the new service.

(7) Headend Upgrades for Small Systems. When adding channels to CPSTs, independent small systems, as defined in Section 76.901(c) of this Subpart, and small systems owned by small multiple system operators, as defined in Section 76.922(b)(5), may choose among the methodologies set forth in this paragraph and in paragraphs (2) and (3). Operators choosing the methodology of this paragraph may increase rates to recover the actual cost of the headend equipment required to add up to seven channels to CPSTs, not to exceed $5,000 per additional channel, plus any applicable programming costs. Rate increases pursuant to this paragraph may occur between January 1, 1995, and December 31, 1997, as a result of additional channels offered on those tiers after May 14, 1994. Headend costs shall be depreciated over the useful life of the headend equipment. The rate of return on this investment shall not exceed 11.25 percent. In order to recover costs for headend equipment pursuant to this paragraph, small systems must certify to the Commission their eligibility to

use this paragraph, the level of costs they have actually incurred for adding the headend equipment and the depreciation schedule for the equipment.

(8) Sunset Provision. Paragraph (e) shall cease to be effective on January 1, 1998 unless renewed by the Commission.

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3. Section 76.964 is amended to redesignate this Section to read as follows:

Sec. 76.964 Written notification of changes in rates and services

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4. Section 76.981 is amended to replace the existing section and to read as follows:

Sec. 76.981 Negative option billing.

(a) A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. A subscriber's failure to refuse a cable operator's proposal to provide such service or equipment is not an affirmative request for service or equipment. A subscriber's affirmative request for service or equipment may be made orally or in writing.

(b) The requirements of paragraph (a) of this Section shall not preclude the adjustment of rates to reflect inflation, cost of living and other external costs, the addition or deletion of a specific program from a service offering, the addition or deletion of specific channels from an existing tier or service, the restructuring or division of existing tiers of service, or the adjustment of rates as a result of the addition, deletion or substitution of channels pursuant to Section 76.922 of this Subpart, provided that such changes do not constitute a fundamental change in the nature of an existing service or tier of service and are otherwise consistent with applicable regulations.

(c) State and local governments may not enforce state and local consumer protection laws that conflict with or undermine paragraphs (a) or (b) of this Section or any other sections of this Subpart that were established pursuant to Section 3 of the 1992 Cable Act, 47 U.S.C § 543.

5. Section 76.986 is amended to replace the existing section and to read as follows:

Section 76.986 "A la carte" offerings

(a) Collective offerings of unregulated per-channel or per-program ("a la carte") video programming shall be regulated as CPSTs pursuant to Section 76.922 of this Subpart. For purposes of this Section, "multiplexed" channels shall be treated as one channel.

(b) A discounted package price offered by a cable system is not unreasonable with respect to any collective offering of channels if the component channels' collective offering also have been continuously available on the system on a per channel basis since April 1, 1993.

(c) A collective offering of per channel offerings may be treated as a New Product Tier if

(i) the collective offering meets the conditions set forth in Section 76.987, or

(ii) the operator had reasonable grounds to believe the collective offering involving only a small number of migrated channels complied with the Commission's requirements as of the date it was first offered.

(d) In reviewing a basic service rate filing, local franchising authorities may make an initial decision addressing whether a collective offering of "a la carte" channels will be treated as a cable programming service tier that is an NPT under Section 76.987 of this Subpart or a CPST that is regulated under Section 76.922 of this Subpart. The franchising authority must make this initial decision within the 30 day period established for review of basic cable rates and equipment costs in Section 76.933(a) of this Subpart, or within the first 60 days of an extended 120 day period (if the franchise authority has requested an additional 90 days) pursuant to Section 76.933(b). The franchising authority shall provide notice of its decision to the cable system and shall provide public notice of its initial decision within seven days pursuant to local procedural rules for public notice. Operators or consumers may make an interlocutory appeal of the initial decision to the Commission within 14 days of the initial decision. Operators shall provide notice to franchise authorities of their decision whether or not to appeal to the Commission within this period. Consumers shall provide notice to franchise authorities of their decision to appeal to the Commission within this period.

(e) A limited initial decision under paragraph (b) shall toll the time periods under Section 76.933 within which local authorities must decide local rate cases. The time period shall resume running seven days after the Commission decides the interlocutory appeal, or seven days following the expiration of the period in which an interlocutory appeal pursuant to paragraph (b) may be filed.

(f) A local franchising authority alternatively may decide whether a collective offering of "a la carte" channels will be treated as an NPT as a part of its final decision setting rates for the basic service tier. That decision may then be appealed to the Commission as provided for under Section 76.945 of this Subpart.

6. Section 76.987 is added to read as follows:

Section 76.987: New Product Tiers

(a) Operators may establish a category of CPSTs, referred to as "new product tiers" ("NPTs"), and offer these tiers to subscribers at prices they elect.

(b) In order to be eligible to offer NPTs, cable operators must meet the following conditions:

(1) Operators offering NPTs are prohibited from making fundamental changes to what they offer on their BSTs and CPSTs offerings on September 30, 1994. Operators may drop channels or move channels between BSTs and/or CPSTs or to an a la carte offering so long as the aggregation of such changes do not constitute a fundamental change in their BST or CPSTs.

(2) Operators may not drop channels that were offered on their BSTs or CPSTs on September 30, 1994 and move them to NPTs unless they wait at least two years from the date the channels were dropped from the BSTs or CPSTs. Time shifted versions, slightly altered versions or renamed versions of channels offered on BSTs and CPSTs on September 30, 1994 shall not be exempt from this restriction.

(3) Operators must market their BSTs and CPSTs so that customers should be reasonably aware that (1) those tiers are being offered to the public; (2) the names of the channels available on those tiers; and (3) the price of the tiers. A subscriber may not be charged for an NPT unless the cable operator has obtained the subscriber's affirmative consent. Changes to the fundamental nature of an NPT must be approved by subscribers in accordance with § 76.981.

(4) Operators may not require the subscription to any tier, other than a BST, as a condition for subscribing to an NPT and operators may not require subscription to an NPT as a condition for subscribing to a CPST. These restrictions will not apply to cable operators prior to October 5, 2002, if such operators lack the capacity to offer BSTs and NPTs without also providing other intermediate tiers of service as provided in Section 76.900(c) of this Subpart.

(c) Operators may offer the same service on NPTs as are on one or more BSTs or CPSTs. A channel that occupied a CPST or BST part-time on September 30, 1994 also may be offered full-time on an NPT as long as it continues to be offered at least part-time on the CPST or BST, under substantially the same conditions as before it was offered on the NPT. If a channel occupies a BST or CPST (regulated pursuant to Section 76.922 of this Subpart) full-time on September 30, 1994, and is subsequently reduced to part-time on the BST or CPST, that channel may not be offered on an NPT full-time. Operators that offer a channel both on an NPT and a BST or CPST will have a continuing obligation to ensure that subscribers are aware that the channels are available on the CPST or BST.

(d) Operators may temporarily place new channels on CPSTs for marketing purposes and then move them to NPTs. In order for an operator to move a channel from a CPST to an NPT pursuant to this paragraph, the channel must not have been offered on a BST or CPST prior to October 1, 1994.

(e) After initially electing to offer an NPT, a cable operator may cease to provide the NPT, upon proper notice to subscribers pursuant to Section 76.964 of this Subpart. If an operator drops an NPT and subsequently determines to reestablish that tier, at the time of the reestablishment it must comply with the conditions for offering NPTs set forth in paragraph (b).

(f) If the Commission receives a complaint about an NPT, the operator need not file the rate justification provided in Section 76.956 of this Subpart, but shall within the time period provided by that rule file documentation that the NPT meets all the conditions set forth in this Section.

(g) Within 30 days of the offering of an NPT, operators shall file with the Commission, a copy of the new rate card that contains the following information on their BSTs, CPSTs and NPTs: (i) the names of the programming services contained on each tier, and (ii) the price of each tier. Operators also must file with the Commission, copies of notifications that were sent to subscribers regarding the initial offering of NPTs. After this initial filing, cable operators must file updated rate cards and copies of customer notifications with the Commission within 30 days of rate or service changes affecting the NPT.

APPENDIX C

TECHNICAL APPENDIX

INTRODUCTION

In this Technical Appendix we describe the analysis and statistical methodology we used to inform our choice of the specific numerical values of the going forward price cap structure.

Under our new, alternative going forward rules, an operator[1] may raise rates for CPSTs[2] when it increases the number of channels offered on those tiers. These rate increases are designed to cover the cost of providing this additional programming to consumers. Specifically, these costs include the cost of an operator's capacity used to provide programming, the fees paid for programming, and marketing costs. In order to protect consumers from the exercise of market power by a cable operator that elects to use the new going forward rules, rate adjustments to CPSTs will be governed by a price cap which limits the amount of the permitted rate increase according to the following rules:

1. For each channel added to CPSTs between January 1, 1995 and December 31, 1997, an operator may not increase the monthly per subscriber charges, for non-programming costs, more than $0.20.[3] The $0.20 per channel limit is the *per channel adjustment factor.*[4]

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[1] Consistent with the *Code of Federal Regulations,* in this Appendix we use the following definitions. The term "cable system" refers to the physical system that delivers cable services to its subscribers in a particular area. The term "cable system operator" or "operator" refers to the entity that owns and/or operates one or more cable systems. These definitions are explained in more detail at 47 C.F.R. § 76.5(a),(cc).

[2] In this Appendix, unless indicated otherwise, we use "CPSTs" to mean existing cable programming service tiers that are rate regulated under Section 76.922 of our rules. Although new product tiers are CPSTs within the meaning of the 1992 Cable Act, in this Appendix they are separately referred to as new product tiers or "NPTs".

[3] This order provides specific rules on how systems may adjust their rates when removing channels from, or switching existing channels between the BST or the CPSTs. These specific regulations are contained at paras. 84-86 in the text of this order.

[4] The revised regulations may be used to adjust rates for channel additions occurring after May 14, 1994.

2. For all channels added to CPSTs between January 1, 1995 and December 31, 1996, an operator may not increase the monthly per subscriber charges, for non-programming costs, by more than $1.20. The $1.20 is the *operator's cap.*

3. An operator may use any portion of the operator's cap to pay for programming costs. In addition, an operator may charge an additional amount of programming costs to subscribers during the first two years. This additional amount is limited to $0.30 for new channels added to CPSTs. The $0.30 is the *license fee reserve.*[5] Thus the total increase in the monthly per subscriber charges for CPSTs cannot exceed $1.50 over the period from January 1, 1995 through December 31, 1996. This $1.50 includes both amounts due to application of the per channel adjustment factor (i.e., the $1.20 operator's cap) and amounts due to application of the license fee reserve.

4. Finally, in the third year of the three-year period, the operator's cap rises by $0.20 to a total of $1.40. Hence, the increase in the monthly per subscriber charges for CPSTs, for non-programming costs, cannot exceed $1.40 over the three-year period. The license fee for the channels added in the third year will be subject only to the Commission's general rate rules, and will not be constrained by the license fee reserve.

In this Appendix, we present the data and analysis we used to inform our choice of the specific numerical values of: (1) the per channel adjustment factor, (2) the operator's cap, and (3) the license fee reserve. The rationale for the addition of a seventh channel in the third year is discussed in the section on the operator's cap. In addition to describing the data and methodology employed by the Commission in its own study, this Appendix also reviews the studies submitted to the Commission by commenters filing in response to the *Fifth Notice of Proposed Rulemaking* in MM Docket No. 92 - 266. We review the studies submitted by outside parties and describe the approach taken by the Commission for each of the key variables in the price cap structure.

1. THE PER CHANNEL ADJUSTMENT FACTOR

The per channel adjustment factor is the maximum permitted rate increase (for non-programming costs) for each channel an operator adds to its system's CPSTs. The adjustment factor reflects the cost that an operator facing effective competition would incur.

There are two possible approaches to estimating the adjustment factor. One is to construct the number directly from cost data. The other approach is to estimate the competitive costs. In its current rules, the Commission takes a hybrid approach: programming costs are granted external cost treatment, while other costs are included in the per channel

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[5] If six channels were added in the first two years, the average programming costs per channel would be $0.05.

adjustment factor based on our examination of operator behavior. Commenters generally supported some variant of our hybrid approach.[6]

We believe that this hybrid approach serves the public interest. It avoids the administrative costs of conducting a full study to identify all costs, while ensuring that the parameters of our rules are empirically based, and serves both to protect consumers and to encourage systems to add channels.

As stated in the Order, we are convinced that for most cable systems our current per channel adjustment factor (based on a cross-sectional analysis of the Commission benchmark survey data) is too small. As a result, the current factor does not create sufficient incentives for adding new channels. Several programmers that submitted comments urged the Commission to provide increased incentives to cable systems. These commenters told us that our 7.5 % markup scheme disadvantaged new services, which generally had minimal or no license fees. The commenters also said that the 7.5 % mark-up did not cover the costs incurred to add new channels.[7]

Out of concern that the current per channel adjustment factor is too low to provide adequate incentives for most systems to add channels, we re-estimated the value of the per channel adjustment factor. In their comments, three parties proposed specific methodologies for determining some or all of the numerical values in the Commission's price cap structure. These parties are: Tele-Communications, Inc. (TCI), the National Cable Television Association (NCTA), and Continental Cablevision, Inc. (Continental). We begin by reviewing and evaluating the two studies submitted by TCI and NCTA, since they are based on the same general approach that we followed. We then describe our own study. Finally, Continental's proposal, which takes a different approach, is discussed.

As do the TCI and NCTA studies, we examined rate changes associated with channel changes in a sample of systems between two points in time. It is appropriate to examine changes over time because the price cap structure applies to changes in the number of channels over time. Thus, our time-series approach is more appropriate than a cross-sectional approach, which would examine differences among systems at a point in time rather than changes over time.

We estimated the per channel adjustment factor using publicly available data and commonly accepted statistical techniques. We drew a sample of 500 systems that is

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[6] See, however, Sammons Communications, Inc., Reply Comments in Response to Fifth Notice, at 19.

[7] NCTA Comments on Fifth Notice at 7 - 8; Cable Telecommunications Association Comments on Fifth Notice at 2 - 3; Cablevision Industries Corp. (CVI) Comments on Fifth Notice at 5 - 6.

representative of the systems that have insufficient incentives to add channels under our current rules. Although our sample is statistically valid, there are also other statistically valid samples. Differences between data sources and statistical techniques yielded different estimates of the elements of our formula. The estimates provide upper and lower bounds within which the exact value of the per channel adjustment factor lies. Having estimated these bounds, the Commission exercised its discretion to choose the value of the per channel adjustment factor that will best achieve the policy goals of the 1992 Cable Act.

Our basic methodology in examining the per channel adjustment factor was to estimate the current cost of adding a new channel under competitive conditions. It was not possible to observe these costs from current data, since comprehensive industry cost data are not available.[8] Therefore, we estimated the cost of a channel addition from historical data. We first recognized that the historical data that were available to us were in the form of rates or prices charged, rather than in the form of costs. To go from rates to a system's costs of adding a new channel, we adjusted the data for inflation, market power, and programming costs. This approach can be explained in terms of the generic per channel adjustment equation as shown below:

$$\text{per channel adjustment factor} = \frac{(R_2 - R_1)}{(N_2 - N_1)} \times MPA - \frac{(LF_2 - LF_1)}{(N_2 - N_1)}$$

where,

R_2 = Subscriber-weighted average monthly rates in year 2 for all relevant tiers, adjusted to 1994 dollars.

R_1 = Subscriber-weighted average monthly rates in year 1 for all relevant tiers, adjusted to 1994 dollars.

N_2 = Subscriber-weighted average number of channels in year 2.

N_1 = Subscriber-weighted average number of channels in year 1.

MPA = Market power adjustment.

LF_2 = Average monthly programming cost per subscriber in year 2, adjusted to 1994 dollars.

LF_1 = Average monthly programming cost per subscriber in year 1, adjusted to 1994

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[8] *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking* (*Second Reconsideration. Order*), MM Docket 92-266, 9 FCC Rcd. 4119 (1994), at para. 107.

dollars.

The variables in the per channel adjustment equation are expressed above in general form. To make them more specific, several choices are necessary. We now explain the key choices behind each variable. Differences among the TCI Study, the NCTA Study, and our own Cable Services Bureau Study generally reflect different choices about how to measure the key variables in the per channel adjustment factor equation.

The key choices that determine the per channel adjustment factor are as follows:

(1) the data set, including: the period covered, the tier or service used to count channel additions, the type of channel additions counted, and the weighting scheme;

(2) the inflation index;

(3) the market power adjustment (MPA); and

(4) the method of estimating programming costs.

To define the subscriber-weighted average monthly rates (R) and the number of channels (N), the key choices are the weighting scheme and the type of channels to be counted. R and N make up the first term of the equation: $R_2 - R_1$ is the change in rates and $N_2 - N_1$ is the change in number of channels. Thus, assuming an increase in the number of channels, $(R_2 - R_1) / (N_2 - N_1)$ is the increase in rates per channel added.

The first adjustment made to the historical data was for inflation. The per channel adjustment factor is intended to cover the costs of adding a new channel. Since the rate data include price increases for inputs such as labor and materials associated with old channels, one must subtract these cost increases from the historical data. To adjust for such inflationary input price increases, a price index (e.g., the Gross Domestic Product Price Index or the Consumers' Price Index) is used.

Another adjustment was for market power. If an operator has market power, it is able to charge subscribers a price above the competitive cost for new channels offered. Thus, one must estimate the MPA and multiply $[(R_2 - R_1) / (N_2 - N_1)]$ by the MPA. Since market power raises rates above competitive costs, the MPA is less than one, and this adjustment reduces the change in rates per channel.

The last term in the per channel adjustment equation accounts for programming costs (LF). These costs are subject to external cost treatment and thus should be excluded for purposes of setting the per channel adjustment factor. Since the observed monthly rates per channel include programming costs (e.g., license fees), these costs must be deducted from our estimates. To adjust the change in rates per channel to remove programming costs, we must

compute the change in LF per channel added. The change in license fees per channel is defined as $(LF_2 - LF_1) / (N_2 - N_1)$.

Having described the per channel adjustment factor in general form, we next consider two commenters' studies that estimated this factor.

The TCI Methodology

TCI used two data sources to estimate the per channel adjustment factor.[9] The following table lists the choices TCI made in their estimating procedure.

R_2 = Subscriber-weighted average monthly rates in 1991 for the "most popular service", adjusted to 1994 dollars.

R_1 = Subscriber-weighted average monthly rates in 1986 for the "most popular service", adjusted to 1994 dollars.

N_2 = Subscriber-weighted average number of channels in 1991.

N_1 = Subscriber-weighted average number of channels in 1986.

MPA = 0.83 = (1 - 0.17) = Market power adjustment

LF_2 = Average monthly licensing fee per subscriber times number of satellite channels in 1991, adjusted to 1994 dollars.

LF_1 = Average monthly licensing fee per subscriber times number of satellite channels in 1986, adjusted to 1994 dollars.

TCI used two different approaches to estimate the per channel adjustment factor. The key choices in the first approach are summarized in Table 1, row 1 (labeled TCI 1). One key choice was their use of GAO data. TCI used data from the 1986 and 1991 GAO cable rate surveys. The GAO surveys report average rates, total channels, satellite channels, and other variables for the most popular service and the lowest price service. TCI used the most popular service figures. The most popular service is defined by GAO as the one to which the most customers subscribe. It may be the basic tier or it may be basic plus expanded basic on

[9] See *A Competitive Markup Approach to Establishing Rates When Adding Cable Program Services.*

different operators' systems.[10] TCI also estimated average monthly programming costs by multiplying the subscriber-weighted average costs by the average number of satellite channels.[11]

TCI derived its per channel adjustment factor as follows. First, TCI calculated changes in inflation-adjusted most-popular tier rates for the relevant time intervals. Second, TCI divided the rate changes by the corresponding change in the number of channels.[12] To adjust for market power, TCI then multiplied the per channel rate change by 0.83, reflecting the competitive differential that the Commission identified in its rate regulation proceeding. Then, TCI subtracted the estimated change in programming costs per channel added to derive a per channel adjustment factor of $0.211 for the November 1986-April 1991 period. TCI refers to its first approach as the "same-cost method".[13]

As an alternative approach, TCI used the FCC benchmark data set to estimate the per channel adjustment factor. This second approach is summarized in Table 1, row 2 (labeled

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[10] During the relevant time period, basic service generally included local broadcast signals, PEG channels (public, educational, and government access channels), and some satellite channels. Expanded basic generally included additional satellite channels.

[11] TCI used subscriber-weighted top-of-rate-card cost estimates from Paul Kagan Associates, Inc. Because these numbers do not include discounts on programming, they overstate programming costs.

[12] For the 1986-1991 period, the GAO sample shows an identical average increase in the number of satellite and total channels. Thus, in this TCI study, the choice of the type of channels added did not change the per channel adjustment factor.

[13] TCI also used a "lower-cost method". The lower-cost method is implemented by calculating the change in inflation-adjusted rates per channel net of programming costs and then multiplying that difference by 0.83. The per channel equation would be:

$$\left[\frac{(R_2-R_1)}{(N_2-N_1)} - \frac{(LF_2-LF_1)}{(N2-N_1)} \right] \text{ X } MPA \qquad \textit{(Lower-Cost Method)}$$

Since the change in per channel license fees was adjusted by the MPA (which is less than one), the programming adjustment is smaller under the lower-cost method. This smaller adjustment yielded a per channel adjustment that is 5 cents higher than the same-cost method, $0.26 rather than $0.211. The lower-cost method is based on the assumption that programmers can extract a significant share of cable systems' profits. We find this assumption to be less plausible than the assumption that programming costs do not differ systematically between competitive and non-competitive cable systems. We therefore used the same-cost method and obtained estimates of the per channel adjustment factor that are close to TCI's estimate.

TCI 2). TCI began with separate calculations of the inflation-adjusted annual rate change between November 30, 1986 and September 30, 1992 for each non-competitive system in the FCC benchmark sample. For each non-competitive system, TCI calculated a rate increase per channel added. These figures were combined with the same programming cost data used in the GAO data set calculations to derive the per channel adjustment factor using the same-cost method. The per channel adjustment factor under this method is $0.30.[14]

Although we believe TCI's overall methodology is reasonable, both of TCI's approaches have shortcomings. The first approach does not properly estimate the costs of adding new channels to the system. It does not adequately distinguish between adding a new channel and switching an established channel from one tier to another. TCI started with monthly rates from the GAO surveys for the most popular service in 1986. Between 1986 and 1991, however, the most popular service changed because of tier restructuring. Tier restructuring involves the movement of channels between tiers, not the addition of new channels to the system. Yet, the price cap structure relates only to new channels added to an operator's system. Hence, GAO data on the most popular service give an inaccurate picture of the number of new channels added to an operator's system. Failing to account for such restructuring can bias the estimates of the per channel adjustment factor.

The tier restructuring problem inherent in the GAO data is not easily corrected. GAO data on cable rates are based on types of services offered rather than on specific tiers of service. Hence, use of GAO data for estimating the cost of adding a channel to a tier would require converting service-based rates to tier-based rates. The information needed to do this conversion is not available.

In its second study, TCI applied its methodology to data from the FCC benchmark survey. While this second study does not suffer from the tier restructuring problem, it is subject to a different limitation. TCI took a weighted average of rates across systems. This is single weighting. However, TCI did not also take a weighted average of rates across tiers within each system. Doing both types of weighting is double weighting. Both weighting schemes need to be considered. Each provides a useful check on the results of the other. TCI should have at least attempted the double-weighting scheme, and explained why it was not applicable.[15]

The NCTA Methodology

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[14] TCI also used the lower-cost method with this data set. Using the lower-cost method, which applied the MPA to the change in per channel programming costs (see n. 11), resulted in a higher per channel adjustment factor of $0.34.

[15] The difference between single- and double-weighing schemes is explained more fully below in the subsection *The Weighting Scheme*.

NCTA submitted a study that used data on municipal and overbuild systems from the FCC benchmark survey.[16] NCTA calculated a per channel adjustment factor ranging from 30 cents to 77 cents. The 30 cent estimate is the median and the 77 cent estimate is the average. NCTA's rationale for using this sample was that the systems met the statutory definition of effective competition, and thus the pricing of these systems represented competitive behavior.

The following table lists the choices NCTA made in estimating the per channel adjustment factor.

R_2 = Average monthly regulated revenues per subscriber in 1992 for all regulated tiers, in 1992 dollars.

R_1 = Average monthly regulated revenues per subscriber in 1986 for all regulated tiers, adjusted to 1992 dollars.

N_2 = Number of channels in 1992 (total channels).

N_1 = Number of channels in 1986 (total channels).

MPA = By selecting a competitive sample, NCTA removed the effect of market power.

LF_2 = Average licensing fee per subscriber times the number of satellite channels in 1992, in 1992 dollars.

LF_1 = Average licensing fee per subscriber times the number of satellite channels in 1986, adjusted to 1992 dollars.

Table 1, row 3 shows the NCTA choices. Unlike the first TCI study, the NCTA study avoided the problem of tier restructuring.

However, the NCTA study has two limitations. First, NCTA used data that pertain largely to a single year to estimate the per channel adjustment factor, which relates to changes over time. Because the benchmark data set is missing observations for 1986, NCTA could not properly use it to calculate changes in rates and number of channels between 1986 and 1991.[17] However, the benchmark data set contains sufficient observations for 1991 to estimate the competitive differential, which we used as our market power adjustment. As explained in the Commission's *Second Order on Reconsideration*,[18] the competitive differential is the

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[16] See *Going Forward Rules For New Channels*.

[17] While the benchmark survey requested 1986 and 1991 data, a poor response for 1986 data made the data set less useful for 1986-1991 comparisons.

[18] *Second Reconsideration Order*, at paras. 1 - 8.

average difference in rates between systems subject to effective competition and systems not subject to effective competition.

A second limitation of the NCTA study is the exclusion of compulsory license fees from estimated programming costs. Compulsory license fees are the royalty payments made by cable operators to copyright holders for retransmission of television broadcast signals. NCTA estimated programming costs using annual basic license fee data from Paul Kagan Associates. The per-subscriber license fee was obtained by dividing the annual fee by the number of basic tier subscribers which, in turn, was divided by 12 to get the monthly per-subscriber license fee. Next, the monthly per-subscriber license fee was divided by the number of satellite channels to get the average monthly license fee per satellite channel. NCTA calculated the programming costs of each of the 17 systems by multiplying the average monthly license fee per satellite channel by the number of satellite channels in each system. This method underestimates total license fees because it excludes the compulsory portion of the license fee. As a result of underestimating the license fee, the estimate of the per channel adjustment factor is too high.

Cable Service Bureau (CSB) Study

Our approach is similar to TCI's approach, with two exceptions. Whereas TCI used GAO's most popular service, we used all regulated tiers.[19] Also, we weighted our sample by the number of subscribers in each tier and by the number of subscribers for each operator. By contrast, TCI weights their sample by subscribers by operator. The CSB approach can be summarized using variables in the per channel adjustment equation as follows:

R_2 = Subscriber-weighted average monthly rates in 1991 for all regulated tiers, adjusted to 1994 dollars.

R_1 = Subscriber-weighted average monthly rates in 1986 for all regulated tiers, adjusted to 1994 dollars.

N_2 = Subscriber-weighted average number of channels in 1991 (total channels).

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[19] All regulated tiers include all tiers of service with the exception of tiers composed of:

(1) Video programming offered on a pay-per-channel or pay-per-program basis; or

(2) A combination of multiple channels of pay-per-channel or per-program video programming offered on a multiplexed or time-shifted basis.

See 47 C.F.R. §76.901.

N_1 = Subscriber-weighted average number of channels in 1986 (total channels).

MPA = 0.83 = (1 - 0.17) = Market power adjustment

LF_2 = Monthly licensing fee expenditures per subscriber in 1991, adjusted to 1994 dollars.

LF_1 = Monthly licensing fee expenditures per subscriber in 1986, adjusted to 1994 dollars.

In the remainder of this section we spell out the Commission's approach in detail.

The Data Set

In order to estimate the elements of the going forward rule structure, we considered three sources of data: the GAO *Survey of Rates and Services Offered by Cable Television Systems* (hereafter called GAO data set); the FCC's benchmark survey (hereafter called the benchmark data set); and data from the *Television and Cable Factbook* (hereafter called the *Cable Factbook* data set). We believe that the *Cable Factbook* is the best suited data set to estimate the elements of the price cap structure for three reasons.

First, the *Cable Factbook* data set includes data for each year for the 1986 to 1991 period. This time series allowed us to analyze changes in rates and in the number of channels. We used these changes to estimate the per channel adjustment factor. Because the benchmark data set is missing observations for 1986, we could not use it to calculate changes in rates and number of channels between 1986 and 1991.[20] However, the benchmark data set contains sufficient observations for 1991 to estimate the competitive differential, which we used as our market power adjustment.

Second, the *Cable Factbook* data set includes all tiers, and allowed us to identify new channel additions to each system. Thus, we could separate new channel additions from channels moved between tiers. This eliminated the problems caused by tier restructuring. As a result, our estimates of the per channel adjustment factor are correctly based only on new channels added to the system. Established channels that were switched from one tier to another did not affect our estimates of the per channel adjustment factor.

Unlike the *Cable Factbook* data set, the GAO data set did not allow us to distinguish new channel additions from channels switched between tiers. The data set contains rates only for the most popular service and the lowest price service. As noted above in our discussion of the first TCI study, the GAO data set could bias the estimated cost of adding a new

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[20] Although the benchmark survey requested 1986 and 1991 data, the response for 1986 was incomplete which made the data set less useful for 1986-1991 comparisons.

channel to a system.

Third, the *Cable Factbook* data set includes all large systems. This ensured that our estimate of the per channel adjustment factor achieves our goal of providing adequate incentives for systems to add channels. The existing rules allow for different per channel adjustments for large and small systems. However, the existing rules provide inadequate incentives for systems to add channels. Our new rules provide adequate incentives for small systems, such as the headend cost adjustment. When we estimated the per channel adjustment factor, we wanted to ensure that large systems also have adequate incentives. Thus, we used a data set that included all large systems.

Our sample of cable systems included 500 systems which were in operation both in 1986 and 1991. We used a stratified random sampling method to select our sample. We had nine distinct strata based on the number of subscribers on the system. Table 2 shows the composition of our sample. This sampling method weights systems with a larger number of subscribers and those with a smaller number of subscribers in proportion to their relative shares in the total number of subscribers in the industry. Accordingly, we included most of the top 200 cable systems. In addition, 31.92% of our sample is made up of systems with more than 50,000 subscribers. Weights for the remaining strata were in proportion to their percentage of the total number of basic tier subscribers in the industry as published in NCTA's *Cable Television Developments* booklet, dated April 1994.

The benchmark data set consists of a sample of cable service rates for 1986 and 1991. The rates are for all tiers: basic, extended basic, and all others. The data set consists of a random one percent sample of approximately 3,000 systems. There is no emphasis placed on large systems. In the data used to estimate the competitive differential rate adjustment, the sample includes only 16 of the 100 largest systems.

Appropriate to the task of formulating general going forward rules, which contain separate, specific provisions for small operators, we placed greater emphasis on larger system data over smaller system data. The record strongly suggests that small systems operate under different parameters than large systems and, as a result, have higher administrative and operating costs.[21] Our analysis avoids overestimating the cost of channel additions that would result from an oversampling of these higher-cost systems.

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[21] *Second Reconsideration Order*, at paras. 107, 117-118, 216. *See also*, Coalition of Small System Operators, Supplemental Information re: Programming Costs for Large Cable Operators Versus Small Operators (Feb. 15, 1994); Small Business Cable Association, Supplemental Comments in Further Support of Industry Benchmark Adjustments for Low Density and Smaller Cable Operators (Feb. 15, 1994) at 5-10.

The Time Period

We estimated the per channel adjustment factor using Cable Factbook data on rates during the pre-regulation period (1986-1991). Cable systems were subject to rate regulation only by local franchising authorities between 1974 and 1984. The 1984 Cable Act deregulated the cable industry. By the end of 1986, deregulation was largely completed.[22] Moreover, we believe that a sufficient percentage of cable systems were deregulated by the beginning of 1986 for us to consider all of 1986 deregulated. Even before then, rate regulation by local franchising authorities was not fully effective.[23] Further, local franchising authorities could regulate only basic rates where effective competition was absent. Thus, extended-basic rates were not subject to regulation.[24] As a result, we consider 1986 as the start of the deregulation period before passage of the Cable Act of 1992.

We selected a deregulated period because we wanted to observe unregulated market behavior. Free of the influence of regulation, such data enabled us to estimate the competitive cost of adding a channel. This estimate provided the basis for the per channel rate adjustment factor. However, we could not observe costs directly. What we could observe were historical rates. We therefore looked at historical rates and adjusted them for market power to provide an estimate of costs.

The Weighting Scheme

We considered two types of weighting schemes: (a) single weighting and (b) double weighting. Both schemes yielded subscriber-weighted averages for rates and for the number of channels. To obtain a simple (unweighted) average rate, one starts with rates by tier on each system for a given year. The tier rates are then summed and divided by the number of tiers to obtain the average rate for the system. The average rates are then summed for all systems and divided by the number of systems to obtain the average rate for all systems.[25]

To obtain a subscriber-weighted average rate, weights are applied based on the number of subscribers across tiers, systems, or both. A single weighting scheme weights only once,

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[22] The 1984 Cable Act took effect on December 29, 1984 (Public Law 98-549, 98 Stat. 2780, October 30, 19984, Sec. 9.) The 1992 Cable Act states that "...rates for cable television services have been deregulated in approximately 97 percent of all franchises since December 29, 1986." (Sec. 2,(a),(1).

[23] Rubinovitz, *Rand Journal of Economics*, Vol. 24, No.1, Spring 1993, pp. 6 and 16.

[24] Rubinovitz, p. 2, fn. 1.

[25] A simple (unweighted) average is sometimes referred to as an "equal-weighted" average because every term added to compute the average is given equal weight.

across either tiers or systems.[26] A double-weighting scheme weights twice, across both tiers and systems. In our study, we used a double-weighing scheme that weights across tiers by the number of subscribers on each tier, for a given system, and then weights across systems by the total number of basic subscribers on each system.

We selected double weighting because this method gives a more accurate picture of the experience of the largest number of subscribers on each system. This is desirable because the price cap structure can benefit more subscribers if it is based on the experience of the largest number of subscribers. For example, the double-weighting scheme first weights the individual tier rates by the number of subscribers on each tier. CPSTs are thus emphasized less than basic tiers, reflecting the fact that CPSTs have fewer subscribers. The double-weighting scheme then sums the subscriber-weighted tier rates for each system in a given year. Then, the double weighing scheme weights each system's rate for all tiers by the number of subscribers on the system. Finally, double weighting sums the subscriber-weighted rates for all systems. The resulting sum is a subscriber-weighted average rate for the year.

Adjustments to the Data Set

We made three adjustments to the rates from the *Cable Factbook* data set. First, we adjusted the rates to remove the effects of inflation. Next, we computed observed changes in rates per channel added from one year to the next. Subsequently, we adjusted rate changes to remove the effects of market power. Finally we subtracted the monthly programming expense from the rate increases per channel added. The resulting adjusted rate increase per channel added provided our estimates of the per channel adjustment factor.

Adjustment for Inflation

This adjustment was made using the Department of Commerce's Gross Domestic Product Price Index (GDP-PI). We use the GDP-PI as an adjustment factor because it is a broad-based index that includes all goods and services, including those that cable operators purchase as inputs. In contrast, the Consumer Price Index (CPI) is more representative of the market of goods and services commonly purchased by households. The rates for each year were multiplied by the value of the 1994 GDP-PI inflator for the same year. This allowed us to express all the rates in 1994 dollars, thereby removing the effect of inflation.

Adjustment for Market Power

The exercise of market power was another reason rates increased between 1986 and 1991. Such rate increases were in addition to the costs of adding a channel incurred in a

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[26] TCI used single weighing by system in its studies. TCI also used "single weighing by tier" in which it weighted tier rates by the number of subscribers on each tier, for a given system, and then computed a simple average of these rates across all systems.

competitive environment. Consequently, we reduced observed monthly rates in non-competitive markets by the "competitive differential" found in the FCC's revised benchmark calculation.[27] This reduction was called for in the 1992 Cable Act, which sought to give cable subscribers the benefits of competition (i.e., reduced prices and improved service), when competition does not exist in their local market. The benchmark calculation estimated the average difference between competitive and noncompetitive rates at 17 %. Hence, we reduced the average monthly rate by 17 % to account for the exercise of market power. Failure to adjust the average rate for market power would overestimate the per channel adjustment factor.

Because it is an average, we applied the 17 % adjustment to all systems rather than estimating an individual adjustment factor for each system. We recognize that 17 % may be too large an adjustment for some systems and too small an adjustment for others. In addition, because 17 % was estimated using historical data on existing channels, it may differ from the market power adjustment for existing and newly added channels. Despite these qualifications, we believe that any errors introduced by the use of this market power adjustment do not have a significant effect on the estimates of the per channel adjustment factor.

Adjustment for Programming Costs

We considered two alternative measures of programming costs: "average" license fees and "compulsory plus basic" license fees. The average license fee represents license fees paid by cable operators for a majority of the top twenty cable channels. It takes into account volume discounts and other discounts received by cable system operators. We obtained the data for average license fees for the years 1989 to 1991 from the Paul Kagan Associates *Cable TV Programming* newsletter (April 1992). Annual average license fee data were converted to monthly data by simply dividing by 12. Since average license fees do not include all possible cable programming expenses, they underestimate the total programming expense incurred by an operator. To compensate for this underestimating effect, we used our second measure, the "compulsory plus basic" method.

Our second measure of programming cost, compulsory plus basic license fees, is made up of two parts. The basic portion of the license fee is actual programming costs incurred by operators. We obtained annual basic license fee data from Paul Kagan's *Cable TV Programming* newsletter (March 1992). These license fees are annual expenditures which operators pay to programmers for non-broadcast cable programming services. We then divided annual fees by the number of basic subscribers to get the per-subscriber rate, and then divided by 12 to get monthly data.

The second part is compulsory license fees. These are the semi-annual royalty

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[27] *Second Reconsideration Order* at paras. 76 - 105.

payments that each operator must make for retransmission of TV broadcast signals by its systems. We added compulsory license fee data to basic license fee data to obtain total programming costs incurred by operators. We converted annual compulsory license fee payments data from the U.S. Copyright Office, Library of Congress. We this converted annual data to monthly per subscriber data by dividing the annual compulsory license fee data by the number of basic subscribers and then by 12. All programming cost data were then adjusted for inflation using the GDP-PI. These two methods provided us with an upper and lower bound for estimating programming costs.

Estimates of the Per Channel Adjustment Factor

To estimate the per channel adjustment factor, we calculated the change in monthly rates (net of programming costs) between 1986 and 1991 and divided by the change in the number of channels between 1986 and 1991. Because of differences in data sources and statistical techniques, the estimates we obtained can provide only an upper bound and a lower bound for the per channel adjustment factor. To obtain the upper and lower bounds, we varied the sources of programming costs.

Our estimates of the per channel adjustment factor are summarized in Table 3. The estimates in Table 3 were obtained using different data sources for programming costs. The first row in the table presents the results using basic plus compulsory license fees to adjust for programming costs. The second row presents the results using average license fees to make this adjustment. The columns in Table 3 show how the per channel adjustment factor is calculated. Column 1 shows the per channel change in average monthly rates. These rate changes are already adjusted for inflation and market power, and are divided by the change in the number of total channels. Column 2 shows the per channel change in programming costs. The estimated per channel adjustment factor is shown in column 3. It is calculated by subtracting the estimated programming cost per channel in column 2 from the per channel rate change in column 1.[28]

As shown in Table 3, our two estimates of the per channel adjustment factor are 21.9 cents and 18.7 cents.[29] The average of these estimates is 20.4 cents.

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[28] The estimates shown in Table 3 were obtained using data from 1986 and 1991. We checked these estimates by running a simple regression. The average number of channels was the independent variable. The average monthly rate was the dependent variable. We used data for each year between 1986 and 1991. Our estimates using data only from 1986 and 1991 do not differ significantly from our regression estimates.

[29] The derivations of these calculations are shown in Tables 4 and 5.

Within the lower and upper bound estimates of the per channel adjustment factor (18.7 and 21.9 cents), the Commission has exercised its discretion and selected 20 cents as the value that will best achieve the goals of the 1992 Cable Act. Based on historical experience, we believe that a 20 cent per channel adjustment factor will encourage systems to add new channels to their CPSTs, while at the same time protecting subscribers from excessive rate increases.

The Continental Cablevision, Inc. Methodology

Before concluding the discussion of the per channel adjustment factor, we discuss the proposal of Continental Cablevision, Inc. Under the Continental proposal, the per channel adjustment factor was calculated separately for each system, equal to the system's average rate for all channels, net of licensing fees. Using this method, for example, a system charging $12.00 per month for a 10 channel tier with $2.00 in licensing fees would yield a $1.00 per channel adjustment factor [$1.00 = ($12.00 - $2.00)/10].

Continental argues that its approach is reasonable since it uses rates established under the *Second Reconsideration Order*. As specified by the *Order*, these rates are adjusted downward by 17 % to eliminate the effects of market power. Although these rates may be competitive, there is a serious shortcoming with Continental's proposal. Continental calculated the average charge per channel for all channels rather than the average charge per channel for new channels added to the system. Consequently, Continental's approach failed to account for economies of scale in the provision of services and the likely declining incremental value to subscribers from incremental services. Thus, there is strong reason to believe that Continental's estimates of the per channel adjustment factor are too high. As a result of this shortcoming, we have decided not to adopt the Continental proposal.

2. THE OPERATOR'S CAP

In this section, we describe the procedure for establishing the operator's cap, which limits the amount by which cable system operators may increase monthly per subscriber charges for non-programming costs when they add new channels to their CPSTs. We begin by reviewing why such a cap is necessary.

Where regulation under the 1992 Cable Act has pushed cable rates below their unregulated, profit-maximizing levels, systems under the new rules could have incentives to add low-value channels to regulated tiers to make up for the mandated price reductions, even when doing so raises the cost of programming more than the value of the added channels to subscribers.

Based on a study conducted by Charles River Associates (CRA)[30], the NCTA recommended a cap of $1.50 per year. The CRA study examined the historical increase in rates and found that the average increase in channels is approximately two channels per year with a corresponding increase in rates ranging from $0.21 per channel to $0.26 per channel. While ultimately accepting CRA's estimates, NCTA argued that the rate of channel additions between 1986 and 1991 was limited by a shortage of new programming. NCTA contended that the rapid growth in cable networks currently underway would result in systems adding new channels in excess of two per year in the future.

The underlying approach taken by the Commission in setting the operator's cap was to ensure that systems could continue to add channels at the same rate they did during the deregulated period. This was done by first estimating the historical pattern of channel additions. Then we calculated what operator's cap amount will allow systems to add that number of channels, while charging the per channel adjustment factor for each additional channel plus an allowance for programming costs.

This section focuses on estimating the historical rate of channel additions. There are several issues that we had to address in estimating this rate. For example, we had to consider the pattern of channel additions to ensure that average numbers are not misleading. To see this point, suppose that over a three-year period systems added an average of two channels per year. This average could be the result of each system steadily adding two channels per year. Alternatively, it could be due to two-thirds of the systems adding no channels in a given year, with the remaining one-third adding six channels that same year. Our approach to this problem is as follows. As a first step, we estimated the average rate of channel additions per year. Having found this average rate, we then looked at the distribution of systems whose historical pattern of channel additions fell within a cap based on three times the average rate. Based on the historical pattern of channel additions, we decided to allow systems the flexibility to offer the full complement of channels at any point in the next three years (that is, they will not be restricted by the one-year channel addition average in each year).

Possible changes over time may have affected the historical rate of channel additions. Potential factors include the end of regulation (which might have led to a temporary increase in the rate of channel additions as a "cover" for rate increases), changes in the number and quality of cable services available for systems to add, and the imposition of the must-carry rules.

In order to calculate the average rate of channel additions, as well as the range of channel additions, we had to select the proper sample. The key choices are the time period, the tiers included, and the nature of the channels counted. For the reasons given earlier, we find the time period from 1986 through 1991 to be reasonable for these purposes. In terms of

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[30] *Ex parte* letter from NCTA to Meredith Jones, Chief, Cable Services Bureau, FCC, Attachment 1 (October 13, 1994).

the tiers included, we considered two approaches. One is to include all regulated tiers. Alternatively, one could examine only those channels added to CPSTs. One could argue that historical additions to basic should not be included, given that the operator's cap does not apply to additions to basic. Nevertheless, we believe that the maturation of the cable industry makes it reasonable to project that future additions to CPSTs will be at a rate similar to the past rate of additions to all regulated tiers.

We decided to use total channels (satellite, broadcast, and local origination) to construct our estimate of the operator's cap. We made this decision so that the estimate of the operator's cap is consistent with our estimate of the per channel adjustment factor, which was estimated using total channels.[31] One could argue that the historical pattern of satellite channel additions better reflects the rate of channel additions to CPSTs. We recognize that in the future, channels added to CPSTs will primarily be satellite channels. Our choice to use total channels will not hinder the growth of satellite channels on CPSTs.

To obtain an upper and lower bound for the average number of channels added per year, we varied the weighting scheme. We estimated single-weighted and double-weighted changes in total channels.[32] Our estimates ranged from a single-weighted average of 2.3 channels added per year to a double-weighted average of 2.5 channels added per year. Thus, our estimate of the average number of channels added per year is 2.4. These annual rates correspond to an average of five channel additions over a two-year period and seven channel additions over a three-year period. These numbers influenced our thinking about recovery of costs of a seventh channel in the third year under the price cap structure.

For satellite channels, our estimates range from a single-weighted average of 1.9 channels added per year to a double-weighted average of 2.1 channels added per year. Since total channels added between 1986 and 1991 are slightly higher than satellite channels added, we are confident that our use of total channels to construct the operator's cap will not hinder the addition of satellite channels to CPSTs. If anything, it will better promote satellite channel growth on CPSTs.

In determining the operator's cap, the Commission recognized that the addition of channels is "lumpy". In other words, in any one year a cable system may add more channels than the average, but then refrain from adding channels, or add below the average number of

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[31] It was necessary to use total channels for all regulated tiers in order to solve the problem of tier restructuring and to accurately measure the rate impact of new channel additions.

[32] As discussed earlier, a double-weighting scheme weights channels by subscribers per tier as well as by subscribers per system. A single-weighting scheme weights channels either by subscribers per tier or by subscribers per system.

channels in a subsequent year.[33] Setting the operator's cap to promote channel additions at the historical average rate may be too restrictive. Systems that want to add more than the historical average in any one year may be discouraged from doing so. To avoid discouraging systems from adding new channels, we set the operator's cap at a level that would provide enough added revenue to encourage channel additions at the historical average rate.

Accordingly, the Commission has decided to set the operator's cap to promote the addition of an average of three channels per year for the next two years. This rate corresponds to six new channels over the next two years. With the seventh added channel in the third year, an operator could collect additional revenue for an average of two and one-third new channels per year over the next three years.

The operator's cap provides flexibility in the timing of channel additions. For example, the cap allows an operator to collect added revenue for up to six new channels in the first year, taking the full per channel adjustment factor on each. Moreover, systems that want to add more than seven channels in the next three years can do so by adding channels to NPTs. Alternatively, systems can add more channels to existing CPSTs by taking less than the full per channel adjustment factor on each channel.

The flexibility provided by the operator's cap is consistent with the experience of systems during the pre-regulation period. On average, between 1986 and 1991, 71.6 % of systems added six or fewer channels during any two-year interval. On average during the same period, 61.4 % of systems added seven or fewer channels during any three-year interval. Based on the historical evidence, we believe that the operator's cap will not impose an unreasonable restriction on channel additions to CPSTs over the next three years.

3. THE LICENSE FEE RESERVE

The license fee reserve is the final component of the cap structure that we estimated. At the same time that it protects consumers, the reserve must be set high enough to allow for programming costs associated with new channels added.

As with the operator's cap, our choice of the value of the license fee reserve was informed by determining an appropriate per channel allowance and then multiplying this amount by a rate of channel additions that reflects the historical pattern. Given our earlier estimate of the historical rate of channel additions, our focus in this section is on the estimate of an appropriate allowance per new channel added.

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[33] This lumpiness may reflect the cable systems' need to introduce multiple packages of services in order to build customer loyalty for any one package, and/or economies of scope associated with investment and maintenance costs at the headend.

The first step in establishing the license fee reserve was to estimate license fees that operators historically incurred when they added channels to their systems. Conceptually, one wants to calculate the average license fee per subscriber for each channel added.

We used two types of data to approximate the average license fee incurred per added channel. The first type included license fee expenditures for all programming, both new and old. We used two data sets: basic plus compulsory license fee expenditures and "average" license fee.[34] We used these data to calculate the change in inflation-adjusted license fee expenditures per channel added between 1986 and 1991.[35] This calculation provided an upper bound because we were unable to exclude increases in license fee expenditures caused by price increases for programs already on cable systems. Our upper bound estimate is 12.9 cents.[36]

The second type of data contained the license fees for each new channel in the first year that the channel was introduced commercially. The data set includes all seven channels that were introduced commercially between 1985 and 1991. We used these data to calculate the average license fee (adjusted for inflation) per subscriber.[37]

By focusing only on the license fees associated with newly introduced services, we excluded license fee increases associated with channels already on some cable systems. In addition, we could better account for programmers' practice of discounting license fees in the year that a new service was introduced. Table 6 shows that the average of first-year license fees between 1985 and 1991 is 3.7 cents.

The 3.7 cent estimate is a lower bound because it excludes programs that are new to the system but not to the industry. In addition to adding newly launched programming services, systems add new channels for programming services that are not new to the industry.

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[34] The section on the Adjustment for Programming Costs contains sources and methods used to estimate programming costs.

[35] Mathematically, this is expressed as follows: $\frac{(LF_2 - LF_1)}{(N_2 - N_1)}$, where

LF_2 = Total industry license fee expenditures in 1991
LF_1 = Total industry license fee expenditures in 1986
N_2 = Subscriber weighted total channels in 1991
N_1 = Subscriber weighted total channels in 1986

[36] This upper bound estimate is the average of the two programming cost methods discussed in the section entitled Adjustment for Program Costs.

[37] This estimate is single-weighted by subscribers across cable systems.

The license fee reserve is intended to encourage systems to add new programming, including programming already on other systems. Since previously launched cable programming services may already be commercially successful on other systems, they are likely to be higher priced than the newly launched programming. Therefore, the 3.7 estimate is our lower bound for new programming costs. In sum, the two types of data provide a lower and an upper bound for the change in license fees per channel added. Our estimate of the lower bound is 3.7 cents. Our estimate of the upper bound is 12.9 cents.

Based on the policies we adopt in the Order and our analysis of the data, we believe that a 30 cent license fee reserve will encourage operators to add new channels, while at the same time protecting subscribers from excessive rate increases. First, if operators add six new channels in the next two years, the license fee reserve alone will provide an *average* programming allowance of 5 cents per channel. This 5 cent allowance lies within our upper and lower-bound estimates of historical programming costs. Second, operators may use part of the operator's cap to pay programming costs. Third, our rules permit operators to add programming to NPTs, which are not subject to a rate cap. Finally, the license fee reserve will be in effect for only two years. In the third and subsequent years, new programming will be subject only to the Commission's general rate rules. Thus, new programming can be priced low to gain acceptance in the first two years and then priced higher to reflect its increased popularity in later years.

Statement of Commissioner James H. Quello

In re: Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation
Sixth Order on Reconsideration and Fifth Report and Order

Going forward rules have at long last been adopted. Programmers and cable operators finally know the federal rules of the road. This will, hopefully, allow the programming marketplace to develop, particularly in the realm of New Product Tiers, with respect to which cable operators have been given substantial flexibility to be creative in packaging and marketing packages of exciting new channels.

Nevertheless, these rules, like any rules, represent our best attempt to correctly balance competing interests in the absence of competition. From this perspective, I must repeat what I have emphasized so often in the past: the best mechanism for ensuring that the programming marketplace flourishes is not government regulation, however carefully crafted. Rather, it is the arrival of genuine competition to cable in every franchise area in the country. Competition will ensure that new programming services have every opportunity to succeed based on their merits -- not on whether this Commission has adopted rules that provide sufficient incentives for operators to add new channels. Competition will ensure that subscribers are charged reasonable rates for cable service -- not because of rate regulation but because competitors in a thriving marketplace are providing the best of all possible checks on rates. Competition will ensure that subscribers are able to choose the programming they desire -- not because cable operators are responding to government oversight but because cable systems are competing with alternative providers to offer consumers what they want. Competition will ensure that the cable industry grows and prospers -- not because it is a government-regulated monopoly but because it is free to compete with video dialtone, wireless cable, and other multichannel providers, without the shackles of regulation. Competition will also free this Commission of the extremely difficult and resource-intensive job of rate regulation, enabling us to instead spend our time nurturing the many actual and potential competitors in the video marketplace.

The day that competition arrives is a day I anxiously await. In the meantime, the Cable Act of 1992 looms before us; and we will do our best to ensure that its provisions are fully and fairly implemented.

DISSENTING STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation (MM Docket Nos. 92-266 and 93-215)

Today, the Commission has adopted its going forward rules as they pertain to launch incentives, packaged *a la carte* offerings, negative option billing and affiliate transactions. Unfortunately, I believe that the launch incentive formula allowing for a two (2) year price cap of $1.50, a channel adjustment of 20¢ per channel and a license fee reserve of 30¢ provides little incentive for the addition of programming to the cable programming service tier(s) (CPSTs). Moreover, the elimination of collective *a la carte* offerings (despite the Commission's ability to create a clearly defined safe harbor) as a viable alternative to the "new product tier" (NPT), amounts to a reversal of prior Commission decisions,[1] and raises grave concerns about the Commission's objectives with regard to cable rate regulation. In my estimation, the Commission has failed in its task to provide a level of certainty and flexibility that would allow the cable industry to confidently develop and the capital market to assess strategic business plans to compete in the rapidly evolving video marketplace, particularly with respect to rapidly emerging technologies. Therefore, while I support the Commission's decision with regard to affiliate transactions and for the most part, negative option billing, my dissatisfaction with the resulting regulatory scheme warrants my unequivocal dissent in this decision.

Since the adoption of the 1992 Cable Act, the Commission has been charged with the unenviable task of developing a regulatory framework for an industry that thrived in a deregulated environment for an extended period of time. The Commission focused its efforts on the reasonableness of cable operators' rates for basic and cable programming service tiers. As the Commission was compelled by the 1992 Cable Act to create a regulatory scheme on an accelerated time frame that ensured the provision of reasonably priced service for cable subscribers, I have been concerned that a level of flexibility and certainty through the benchmark methodology of rate regulation be created.

Indeed, since the adoption of the April 1993 *Order*, I have

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[1]See Rate Order and Further Notice of Proposed Rulemaking in MM Docket No. 92-266, FCC 93-177, released May 3, 1993, 58 Fed. Reg. 29736 (Separate Statement of Commissioner Andrew C. Barrett); See also Order in MM Docket No. 92-266, FCC 94-28, 59 FR 1743 (Separate Statement of Andrew C. Barrett).

cautioned the Commission to implement rate regulations in an orderly and effective manner. Moreover, I have expressed concern that the failure to heed this warning would serve to: (i) frustrate the integrity of our regulatory process; (ii) increase the potential for unintended consequences and (iii) create false expectations among the consumer public.[2] To that end, I have also stated that the Commission's rate regulation framework must incorporate measures of flexibility that seek to balance industry, consumer and franchising authority concerns while minimizing the uncertainty that has resulted from the rate regulation proceeding, in general, to allow consumers and the industry to develop realistic expectations and business plans.[3]

In September 1993, it came as no surprise that the cable industry diligently adapted to the new regulatory environment. Actions were undertaken by some operators to design strategic service offerings that conformed to our rules. However, it is believed by some at the Commission, that several operators took advantage of the option to offer *a la carte* service offerings solely as a means to evade rate regulation. Yet, early in this proceeding, it was my contention, that as the cable industry lowered rates in accordance with the Commission's rate regulations, consumers might also experience a corresponding reduction in the quantity of packaged cable services that programming vendors and operators would be willing to provide.[4] Further, I have indicated that more program services might need to be offered on an *a la carte* basis or in a variety of bundled "premium channel packages" to recoup the necessary returns.[5] Thus, while I have been concerned about some of the collective *a la carte* offerings, I have not been willing to concede that all were in violation of our rules per se.

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[2]See Order in MM Docket No. 92-266, FCC 93-372 released July 27, 1993, 58 FR 41402 (Concurring in Part and Dissenting in Part Statement of Andrew C. Barrett). See also First Order on Reconsideration in MM Docket No. 92-266, FCC 93-248, released August 27, 1993, 58 FR 46718 (Separate Statement of Commissioner Andrew C. Barrett); Testimony of Andrew C. Barrett, Federal Communications Commission, Before the U.S. House of Representatives, Subcommittee on Telecommunications and Finance (September 28, 1993).

[3]See Keynote Address by Andrew C. Barrett, Federal Communications Commission, Prentice Hall Law & Business Cable Conference, June 28, 1993. See also Order in MM Docket No. 92-266, FCC 93-372, released July 27, 1993, 58 FR 41042 (Concurring in Part and Dissenting in Part Statement of Commissioner Andrew C. Barrett); Testimony of Andrew C. Barrett, Federal Communications Commission, Before the U.S. House of Representatives, Subcommittee on Telecommunications and Finance (September 28, 1993); Order, MM Docket No. 92-266, released February 8, 1994 (Separate Statement of Commissioner Andrew C. Barrett).

[4]See Keynote Address by Andrew C. Barrett, Federal Communications Commission, Prentice Hall Law & Business Cable Conference, June 28, 1993.

[5]Id.

In February 1994, the Commission, among other things, cited fifteen (15) factors in an effort to provide guidance to cable operators with regard to "acceptable" versus "unacceptable" *a la carte* offerings. Moreover, the Commission promulgated a launch incentive plan for the addition of programming services to cable systems. At that time, I indicated that my support of the decision, and in particular, the establishment of the seventeen percent (17%) competitive differential, was based, in large part, on the understanding that it would represent the "[h]ighest point of what I would consider to an acceptable range" for the policy determination.[6] It was also my understanding that the incorporated launch incentive and *a la carte* decisions would be revisited, if necessary, to ensure flexibility, simplicity and certainty for cable operators commensurate with the higher competitive differential on a prospective basis.[7]

Immediately after the release of the March 1994 Order, industry reaction, as reflected by petitioners and commenters in this proceeding, made it clear that the Commission had not provided an allowance that would offer sufficient incentives for cable operators to add new services. Equally compelling were the parties that inquired as to the method for satisfying the *a la carte* factors with some measure of certainty in an effort to provide unregulated packaged offerings. Indeed, the loser was the cable subscriber who, as we have been advised, may not have benefited from increased choices of service offerings that may have been planned by the operators.

In light of the apparent flaws in the Commission's good faith attempt to create balanced incentives, the "industry" was encouraged to develop a compromise proposal with respect to launch incentives and *a la carte* offerings. The "industry" presented "packaged" concessions for these two (2) issues. The first, concession included launch incentives and the second component, included a "safe harbor" for collective *a la carte* offerings. Unfortunately, this contribution by an industry fraught with diverse concerns and viewpoints for operators and programmers has been summarily rejected, and I would argue, unfairly manipulated by this Commission.

My concerns regarding the decision at hand are founded in the inherent lack of flexibility, certainty and simplicity that emanate from the going forward rules. The Commission, under the auspices of its authority to assert jurisdiction over packages of services (including packages of *a la carte* offerings), has spun what can only be described as a "tangled regulatory web". The convoluted

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[6] See Order in MM Docket No. 92-266, FCC 94-28, 59 FR 1743 (Separate Statement of Commissioner Andrew C. Barrett).

[7] Id.

rationale for regulating every aspect of an operator's packaged service offerings remains unsubstantiated and, in my opinion, obfuscates the intention of the 1992 Cable Act. The intricate and complex formula for launching channels on the cable programming service tier was developed to ensure a singular objective--limiting increases in subscriber prices. Finally, instead of providing a level of certainty to allow cable operators and programmers to create more choices for subscribers, they must always remain mindful of the "threat" of rate regulation for virtually all services which they offer.

The "new product tier" was purportedly conceived to offer operators increased flexibility. Yet, for the addition of new services, it is the only choice (save per channel or per program offerings). Indeed, as long as they agree to certain conditions, operators are promised latitude to be creative and innovative in their services offerings on the NPT. They are encouraged to "assume" that the Commission will not assert jurisdiction over the NPT and to take advantage of market demand. Yet, it is the Commission's silence with regard to "acceptable" as opposed to "unacceptable" collective offerings that is deafening.

The freedom that operators are given under the NPT is frustrated by their inability to discern what will trigger rate regulation for the tier(s) of service in the future (*i.e.* a specific number of complaints, public outcry or general concerns by the Commission as the industry adapts to the new regulatory framework). However, it has become abundantly clear that migration from the basic and CPSTs is wholly unacceptable to this Commission. I suggest that this uncertainty that now exists could have been resolved by the introduction of a safe harbor for *a la carte* offerings. In that way, operators would have the flexibility to knowingly elect the regulatory "conundrum" that comes with the NPT or to conclude that collective offerings meeting the criteria of an established safe harbor would best suit their needs.

Ironically, one of the industry's packaged concessions has been seized and it has become an integral part of the Commission's "going forward" decision--no migration of services from either the basic and cable programming services tiers.[8] By disallowing the migration of these services, the Commission has raised several unsettling issues. First, I am concerned that the Commission may be encroaching on operators' freedom of speech as a result of its decision to disallow migration of services as a condition for offering the NPT. I believe that a less restrictive approach (in the form of limited migration) could have been developed to ensure that cable subscribers continue to receive a substantially similar

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[8]Under the revised going forward framework, operators that elect to offer the NPT are only permitted to migrate new or "incubated" services that are added to the tier after September 30, 1994.

level of service while reducing the potential for evasive tactics by operators.

Second, a significant benefit is bestowed upon those existing programming services that are now carried on the regulated tiers. The need to compete with new services in order to remain on the basic and cable programming service tiers has been effectively eliminated under this revised going forward scheme.[9] It appears that the operator's only option for a programming service carried on the basic tier or CPST that seeks to extract exorbitant price increases is to drop that service. I believe that an operator would be given greater flexibility through *a la carte* packages with a safe harbor for limited migration to address this situation. Clearly, the inability to migrate the service to another tier results in a less palatable choice for an operator whose subscribers may view the service as "popular" and is problematic for the subscriber who is forced to pay the higher price.

Third, systems with more than one hundred (100) channels will not be able to take advantage of the NPT. Consequently, we are affording those operators that have taken the initiative to upgrade their facilities and to provide subscribers with increased programming choices with less favorable treatment than those that have waited to implement upgrades. In the end, as more systems upgrade their infrastructure, I believe that this regulatory disparity will become more conspicuous.

Next, I am concerned that the Commission has on the one hand given the industry a sense of freedom to create the NPT, and on the other, cautioned that it will review the going forward rules to determine whether changes are necessary on a prospective basis. The projected sense of freedom by the Commission thus becomes a misnomer and requires operators to, in effect, "guess" about the amount of latitude that they can anticipate.

Further, I believe the launch incentive plan is based on flawed rationale. The Commission assumes that operators will only increase their basic and cable programming services by two (2) channels each year. The basis for this assumption lies with a Commission analysis of industry trends from 1986 to 1992 where operators were found to add an average of 1.92 channels per year. In light of the upgrades that are being proposed by operators seeking to maintain a competitive edge in the video marketplace, and given a variety of potential competitive strategies for particular cable operators, I fail to see the logic of relying on

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[9] I do not wish to imply that these services will not be encouraged to improve their programming, if necessary. I simply mean that they will no longer be subject to concerns about competition that may exist with the introduction of new entrants into the programming marketplace as they vie to be placed on the basic and cable programming service tiers.

past trends in system channel additions to justify constraints on future behavior. Moreover, while the Commission does not limit any operator to adding two (2) channels per year, the Commission's price cap necessarily encourages the addition of only a limited number of channels to both the basic and cable programming service tiers over a three (3) year period.

My misgivings extend to the implementation of these rules. First, the Commission equates the NPT with a CPST, but opts to regulate them differently. The disparate treatment raises questions about the proper methodology that the Commission may use for determining the reasonableness of the rates on the NPT in the event it is deemed appropriate. Second, cable operators that choose to offer the NPT must file rate cards and material. As a result, cable systems that are not now subject to regulation will become so by virtue of their election to offer the NPT. Finally, the Commission has not indicated how it will react to potential complaints from subscribers who are dissatisfied with prices for the NPT or in the event a single cable operator is believed to have acted in "bad faith" under these going forward rules.

I have consistently raised concerns about issues of flexibility, certainty and balance with regard to the regulation of an industry, and in particular, the cable industry, that seeks to realistically compete in today's telecommunications marketplace. Most recently in the video dialtone proceeding, I stated that: (i) the Commission's cost-of-service rules for cable systems will need to be compatible with the identification of direct costs and standards for allowing common costs in the video dialtone context, and (ii) the Commission must establish standards for cable operators to allocate common costs as they upgrade their distribution networks to provide voice services.[10]

I also indicated that our decision to loosen the regulatory constraints on the telephone companies' provision of video services required us to demonstrate greater flexibility in our approach toward the "going forward" and *a la carte* aspects of cable regulation. Unfortunately, I believe this decision does not incorporate the necessary flexibility for cable operators. I am particularly concerned that the Commission has failed to balance its prior decision on the further rate rollback with an allowance for regulatory parity relative to potential multi-channel video competitors. Instead, the going forward rules will present yet another challenge for the cable industry as we nurture the efforts

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[10] See In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58 and Amendments of Parts 32, 36, 61, 64 and 69 of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, released November 7, 1994 (Separate Statement of Commissioner Andrew C. Barrett).

of their competitors.

SEPARATE STATEMENT
OF
COMMISSIONER SUSAN NESS

Re: Going Forward Rules (MM Docket Nos. 92-266 and 93-215)

Today's decision represents an important piece of a larger puzzle. The cable industry, like the telephone industry, is preparing to undergo a radical transformation, a transition to a competitive market that promises both opportunity and risk.

Our efforts to formulate "going forward" rules must recognize the circumstances, needs, and aspirations of the cable industry. Equally important, we must faithfully carry out our consumer protection responsibilities, as set forth in the 1992 Cable Television Consumer Protection and Competition Act. The rules we adopt today are carefully crafted to encourage the cable industry to do more of what it already does so well, yet also protect consumers against unbridled rate increases. I believe we have struck an appropriate balance.

In my prior life as a media lender, I financed a wide variety of cable and programming companies, large and small. From that experience, I believe that the New Product Tier introduced today embodies the entrepreneurial spirit characteristic of the cable industry. This tier gives cable operators the freedom to design innovative programming packages at market prices that will best attract subscribers and reward operators.

Competition from alternative video delivery media will, in time, allow us to end regulation of cable rates. But "effective competition," as required by the 1992 Cable Act, has not yet arrived. While we manage the transition to competition, we must not stifle the production of quality new program networks nor curtail the operators' flexibility to offer programming in ways that best meet subscribers' demands.

The New Product Tier (NPT) is a win-win-win opportunity. It enables an operator that has the additional capacity to create new packages of programming, knowing that the rules are simple to follow and that the packages will not be price regulated. Programmers benefit from the flexibility offered by the NPT, to offer programming in unique and innovative ways. And consumers benefit from the additional choices NPTs provide at reasonable, market-driven prices.

The structure of the New Product Tier is simple. To offer a New Product Tier, an operator must meet four conditions:

- Preserve the fundamental nature of its regulated tiers.
- Agree not to migrate channels from existing regulated tiers to NPTs.
- Continue to actively market its regulated tiers.
- Affirmatively market its NPTs.

The New Product Tier not only provides operators with price freedom but also reduces administrative burdens. No forms need be filed, nor rate calculations continually revised, in order to offer an NPT.

The New Product Tier is flexible. The range of options available to the operator for structuring its programming packages is broad. A cable operator may offer, as a New Product Tier, existing popular channels "cloned" (not migrated) from the regulated tier along with brand new programming services and price the offering as the operator chooses. For example, "news junkies" may have the option of buying a package of CNN, political talk shows and news programs. A New Product Tier may also be structured as a tier of a la carte offerings, permitting consumers to choose some or all of the services on the tier, again priced at the operator's discretion.

The New Product Tier is innovative. It gives the operator freedom from price regulation and gives the consumer maximum choice. Because New Product Tiers will be offered side by side with price regulated tiers, and therefore compete with them for the consumer's dollar, market pressure, not government regulation, will influence the pricing of NPT offerings. Consumers will be able to choose among packages competing with each other, both in content and price.

But many cable systems lack addressability or have only limited additional capacity. The New Product Tier may be of limited value to them in the near-term. For that reason, the "going forward" order provides incentives to add new services to invigorate existing regulated tiers. We also recognize that many programmers seek the wide audience that regulated tiers provide.

The rules we adopt today provide ample incentive for operators to add new programming to regulated tiers. The data show that cable operators historically have added between two and three new channels per year. The new formula gives an operator the flexibility to add channels at a rate consistent with historical practices.

Most importantly, we want to ensure that, when new programming is added to

regulated tiers, subscribers are not subjected to unreasonable rate increases. Where NPTs are not available, subscribers to regulated tiers have no choice but to pay the higher price attributable to new programming which they may or may not want or drop cable service -- take it or leave it. Today's order reflects the Commission's effort to balance subscriber protections against the needs of operators and programmers.

I am mindful that there will be upward pressure on cable rates every year, from inflation and from increased programming cost pass-throughs from existing program networks, in addition to the increases we permit for new channels. Consumers will not care about the source of the rate increase; they will care deeply about how it affects their pocketbooks. In light of this, I think our rules provide as much flexibility to operators as we can reasonably allow.

The going forward proposal is not complete. While the introduction of New Product Tiers will allow opportunities for future expansion, until we address the proper regulatory treatment of upgrades of cable systems, we have not provided the industry proper incentives for the long term. Additional capacity will be critical for cable to compete with telephone companies in the provision of video programming as well as telephony.

The cable industry promises to be a key player in the development of the National Information Infrastructure. We must move expeditiously to provide operators with the regulatory certainty they need to invest in their infrastructure. Our recent decision on video dialtone makes this all the more imperative. I intend to work diligently toward that end.

SEPARATE STATEMENT OF

COMMISSIONER RACHELLE B. CHONG

DISSENTING IN PART

Re: In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation (MM Docket Nos. 92-266, 93-215)

My overriding goals in this cable "going forward" proceeding have been (1) to provide incentives to cable operators to add new programming services to their systems, consistent with our obligation under the 1992 Cable Act to ensure that cable rates are reasonable, (2) to provide the cable industry with maximum flexibility to respond to consumers, and (3) to provide the industry and the Commission with certainty by adopting clear, understandable rules. I support most of this item because I believe it is consistent with these goals. However, I do not think the going forward price cap structure for regulated tiers (or "channel adjustment formula"), is consistent with these goals, or my most basic regulatory tenet -- simple pragmatic regulation. Therefore, I respectfully dissent to this portion of the item.

The channel adjustment formula we adopt today allows a cable operator a 20 cent per channel adjustment for each new channel added to a regulated tier, subject to a cap. I support the 20 cent mark-up, and believe it will provide needed incentive to an operator to add channels to its regulated tiers.

I have serious concerns about other aspects of the formula, however. Although my colleagues and I have sought to achieve consensus, it has not been possible due to basic philosophical differences. First, I believe the formula is exceedingly complex. Already, members of the cable industry, particularly small operators, have registered complaints with me about the difficulties they have understanding and complying with the current cable rules. I would have preferred a simpler mechanism that is more readily understandable and lends itself to more predictability in its application and effect on rates.

Second, I would have preferred a formula that gives a cable operator the maximum flexibility to respond to consumer demand in its local service area. For example, the level of the "operator's cap" established in this decision is based on an understanding of past practices of the cable industry. While I certainly agree that we should factor past practices into our decision, I do not believe this should be our primary basis on which we make decisions for the future. We should also consider the programming market, as well as new competition entering the video distribution market.

This decision also limits a cable operator's flexibility by imposing a 30 cent "license fee reserve." I am not convinced that this reserve will have the desired effect given the level of the maximum rate increase allowed under the new rules over a three year period. I prefer that this agency avoid that level of regulation.

I have approved the rest of this item. A few other areas deserve comment. This item discusses the treatment of packages of programs offered on a per channel or per program basis. The decision we make here today represents a change from earlier Commission decisions, in that we exert jurisdiction over such packages.

With my lawyer hat on, I have carefully studied the relevant portions of the 1992 Cable Act and the legislative history on this point. Based on my analysis of the Act and congressional intent, I have come to support this portion of the decision because I believe this is the correct reading of the statute. I come to this decision reluctantly. I recognize that some will perceive this as needlessly imposing further government regulation on the cable industry. Nonetheless, I am obliged to effectuate the plain meaning of the statutory text.

My concern about this aspect of the decision is alleviated to some extent by the creation of "new product tiers." Under this scheme, new programming services are packaged and cable operators are allowed to set rates for such packages based on what they believe the market will bear. If an operator offers new product tiers, it must continue to offer its basic and expanded basic tiers of programming, the latter of which are rate regulated to ensure reasonableness under the 1992 Cable Act. I believe the competition between new product tiers and the regulated tiers will result in a reasonable rate being set for the new product tiers. This new scheme is more consistent with my regulatory philosophy because it relies on market forces to set rates.

Finally, I support the provision in this item that seeks to accommodate the particular problems faced by small cable systems. We adopt a special streamlined cost-of-service procedure for small systems that upgrade their headend equipment. It is my hope that this procedure will allow small systems to add new channels so they, too, can offer new programming services to their subscribers.

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 94-290
Washington, D.C.

In the Matter of	)
4,330 Applications for Authority	)
To Construct and Operate	)
Multipoint Distribution	)
Service Stations at 62 Transmitter Sites	)

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: November 10, 1994 **Released:** December 8, 1994

By the Commission:

Table of Contents

	Title	*Paragraphs*
I.	Introduction	1
II.	Background	2-12
III.	Petitions for Reconsideration	13-202
	Beloit, Alabama	15-17
	Cullman, Alabama	18-20
	Goshen, Alabama	21-23
	Willcox, Arizona	24-26
	Gurdon, Arkansas	27-29
	Hamburg, Arkansas	30-32
	Magnolia, Arkansas	33-36
	Mountain Home, Arkansas	37-39
	Santa Rosa, California	40-42
	Fort Morgan, Colorado	43-45
	Gunnison, Colorado	46-48
	Lamar, Colorado	49-51
	Cross City, Florida	52-54
	Thomaston, Georgia	55-57
	Kellogg, Idaho	58-60
	Rochester, Indiana	61-63
	Lamoni, Iowa	64-66
	Liberal, Kansas	67-69
	Maysville, Kentucky	70-72
	Leesville, Louisiana	73-75
	Ruston, Louisiana	76-78
	Athens, Maine	79-81

Big Rapids, Michigan	82-84
Newberry, Michigan	85-87
Spring Grove, Michigan	88-91
Vicksburg, Mississippi	92-94
Waynesboro, Mississippi	95-97
Cape Girardeau, Missouri	98-100
Cassville, Missouri	101-103
Dunnegan, Missouri	104-106
Kennett, Missouri	107-109
New Brunswick, New Jersey	110-111
Belen, New Mexico	112-114
Bladenboro, North Carolina	115-117
Ellerbe, North Carolina	118-120
Grantsboro, North Carolina	121-123
Kenansville, North Carolina	124-126
Midway, North Carolina	127-129
Ashley-Wishek, North Dakota	130-133
Coshocton, Ohio	134-136
Defiance, Ohio	137-139
Findlay, Ohio	140-142
Upper Sandusky, Ohio	143-145
Pendleton, Oregon	146-148
Ridgeway, Pennsylvania	149-151
Hampton, South Carolina	152-154
Oneida, Tennessee	155-157
Paris, Tennessee	158-160
Center, Texas	161-163
Crockett, Texas	164-166
Huntsville, Texas	167-169
Jasper, Texas	170-172
Mexia, Texas	173-175
San Diego, Texas	176-178
Price, Utah	179-181
Richfield, Utah	182-184
Warsaw, Virginia	185-187
Colfax, Washington	188-190
Beckley, West Virginia	191-193
Logan, West Virginia	194-196
Petersburg, West Virginia	197-199
Portage, Wisconsin	200-202
IV. Discussion	203-240
Appendix A	

I. INTRODUCTION

1. The Commission has before it petitions for reconsideration of the return, pursuant to delegated authority, of 4,330 applications for authority to construct and operate Multipoint Distribution Service (MDS)[1] stations on the E or F channels at 62 transmitter sites. These 4,330 applications were filed with the Commission between January 9, 1991 and April 8, 1992, after the Commission had reopened the filing period for MDS applications on the E or F channels, subject to certain location restrictions. *See* ¶ 10, *infra*.[2] As these petitions raise recurring, common issues,[3] we believe that their consideration *en masse* would be the most efficient use of Commission resources. Thus, we will consider these petitions for reconsideration in this omnibus order, which has been referred by the staff to the Commission pursuant to § 1.106(a) of the Commission's rules, 47 C.F.R. § 1.106(a).

II. BACKGROUND

2. Each of the returned applications proposed an MDS station on the E or F channels to which Part 21 of the Commission's rules apply. Section 21.20(a) of the rules sets forth the standards for returning MDS applications as unacceptable for filing:

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[1] The term MDS refers both to single channel and to multichannel stations used in the Multipoint Distribution Service (MDS). MDS stations on the E and F channel groups are sometimes referred to as Multichannel Multipoint Distribution Service (MMDS) stations. In this order, we use the terms MMDS and MDS stations on the E or F channel groups interchangeably.

[2] The day after the last of these applications was filed, the Commission imposed a freeze on the filing of new applications for MDS stations in a rulemaking proceeding to further explore options which would expedite the processing of MDS applications. *Notice of Proposed Rulemaking*, PR Docket No. 92-80, 7 FCC Rcd 3266, 3270 (1992). The freeze does not apply to MDS applications for modification, renewal, assignment of license, transfer of control, extension of time to construct and signal boosters. *Id.* at 3271.

[3] All of the subject applications, upon review by Commission staff, were returned by individual return notification letters. Review of these applications and the Commission's data base indicates that for each named service area, the same transmitter site was proposed in each application. With few exceptions, which are noted in Section III, *infra*, the applications for each named service area contained identical interference narratives and made identical waiver and public interest showings. In addition, the arguments raised in the reconsideration petitions filed for each applicant were either identical or substantially similar to the arguments raised on behalf of the other petitioning applicants for the same service area.

> Unless the Commission shall otherwise permit, an application will be unacceptable for filing and will be returned to the applicant with a brief statement as to the omissions or discrepancies if:
> (1) The application is defective with respect to completeness of answers to questions, informational showings, execution, or other matters of a formal character; or
> (2) The application does not substantially comply with the Commission's rules, regulations, specific requests for additional information, or other requirements.

47 C.F.R. § 21.20(a). Section 21.20(b) lists examples of common deficiencies which result in defective applications under paragraph (a) such as, the "application does not demonstrate compliance with the special requirements applicable to the radio service involved," the "application does not include all necessary exhibits," and the "application is filed after the cut-off date prescribed in § 21.31 or § 21.914 of this part." 47 C.F.R. § 21.20(b)(4), (8) and (9); *see* 47 C.F.R. §§ 21.13, 21.15, 21.26 and 21.900.

3. Mutual Exclusivity. Typically, the first determination made by Commission staff is whether the MDS application is mutually exclusive with any previously filed application or authorized station. Section 21.31(a) of the Commission's rules provides the standard for this determination.

> The Commission will consider applications to be mutually exclusive if their conflicts are such that the grant of one application would effectively preclude by reason of harmful electrical interference, or other practical reason, the grant of one or more of the other applications. The Commission will presume "harmful electrical interference" to mean interference which would result in a material impairment to service rendered to the public despite full cooperation in good faith by all applicants or parties to achieve reasonable technical adjustments which would avoid electrical conflict.

47 C.F.R. § 21.31(a); *see* 47 C.F.R. § 21.902(c), (d) and (f).[4] In applying this standard, the staff evaluates whether the MDS applications were filed: (1) within 50 miles of an

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[4] Section 21.31 of the rules explains how applications do not have to be directly mutually exclusive to be cut-off:

> For example, applications A, B, and C are filed in that order. A and B are directly mutually exclusive, B and C are directly mutually exclusive. In order to be considered comparatively with B, C must be filed within the "cut-off" period established by A even though C is not directly mutually exclusive with A.

47 C.F.R. § 21.31(c).

authorized or previously proposed MDS station,[5] and (2) within the radio horizon (with an unobstructed electrical path) of the protected service area of an authorized or previously proposed MDS station.[6] Applications which are determined to be either within 50 miles or with an unobstructed electrical path to any part of the protected service area of any station, are considered to be mutually exclusive with the station unless they demonstrate a lack of harmful interference pursuant to the standards

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[5] MDS applicants must submit interference studies analyzing the potential for harmful interference with other MDS stations located within a 50 mile radius of the proposed station because "[i]t is possible for cochannel interference generated by one MDS station to cause unacceptable distortion of another station's signal from as far away as 50 miles." *R.L. Mohr*, 85 FCC 2d 596, 606 (1981); *see* §§ 21.901(d)(7) and 21.902(c)(1) and (2) (1991). The 50 mile benchmark for MDS stations was adopted in *Amendments of Parts 1, 2, 21 and 43 of the Commission's Rules and Regulations to Provide for Licensing and Regulation of Common Carrier Radio Stations in the Multipoint Distribution Service*, 45 FCC 2d 616, 620-21 (1974) (hereinafter *MDS Allocation Order*), which codified, as a rebuttable presumption, Commission policy as to what constitutes mutually exclusive status. *See also Amendment of Parts 1 and 21 of the Commission's Rules and Regulations Applicable to the Domestic Public Radio Services (Other Than Maritime Mobile)*, 60 FCC 2d 549, 559 (1976) (hereinafter *Domestic Public Radio Services Order*). The Commission adopted this 50 mile benchmark to enhance administrative efficiency in processing applications, avoid "gridlock" situations, and permit authorization of stations to proceed expeditiously. *See R.L. Mohr*, 85 FCC 2d at 604; *Sioux Valley Empire Elec. Ass'n, Inc.*, 2 FCC Rcd 7375, 7376 (Dom. Fac. Div. 1988).

[6] As the Commission noted in the MDS technical rulemaking order, "the mileage between these [MDS] stations is not the only factor that determines whether interference will occur." *Amendment of Parts 21, 74 and 94 of the Commission's Rules and Regulations with regard to the technical requirements applicable to the Multipoint Distribution Service, the Instructional Fixed Television Service and the Private Operational-Fixed Microwave Service (OFS)*, 98 FCC 2d 68, 90 (1984) (hereinafter *MDS Technical Order*). In a 1990 order, *Texas Wired Music, Inc.*, File No. 50009-CM-P-90, Call Sign WDU282 (Dom. Fac. Div., released Aug. 27, 1990), we explained the basis for using the radio horizon as a standard for determining mutual exclusivity:

> [T]he latest engineering analysis of the [applicant] demonstrates that a natural phenomenon, radio horizon, substantially reduces the possibility of interference occurring to any receiver of [the authorized station] located in [its] protected service area. . . . Underlying this methodology is the premise that once the signal reaches its radio horizon it is generally blocked or attenuated to such a level that it is not likely to interfere with a receiver beyond that point. The amount of signal attenuation at this point is dependent upon the type of surface the signal encounters and generally ranges between 6 and 20 db.

specified in the Commission's rules. *See* 47 C.F.R. § 21.902(b)(3) and (4) and ¶¶ 6 and 7, *infra*. For the above-referenced MDS applications on the E or F channels, § 21.901(d)(5) also defines mutual exclusivity as based on whether the proposed transmitter site is within a Metropolitan Statistical Area (MSA) or its 15-mile buffer zone of an authorized or previously proposed station. [7]

4. Cut-off Rules. In order to be acceptable for filing, each of the above-referenced MDS applications was required to be filed on or before the applicable cut-off date for mutually exclusive applications.[8] By way of background, the Commission initially authorized the filing of MDS applications on the E or F channels on one filing date, September 9, 1983. *See MMDS Allocation Order*, 94 FCC 2d at 1262-66; *Establishment of Multi-Channel Systems*, 48 Fed. Reg. 33,873, *as corrected* 48 Fed. Reg. 34,746 (1983). Thereafter, no additional applications for new stations were accepted for

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[7] *See Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service*, 94 FCC 2d 1203, 1262-64 (1983)(hereinafter *MDS Allocation Order*). Section 21.901(d)(5), 47 C.F.R. § 21.901(d)(5) (1991), provides:

> Notwithstanding the provisions of Sec. 21.31(a) all applications that propose to locate transmission facilities within or within 15 miles of the border of a Standard Metropolitan Statistical Area (SMSA) will be considered together. In the case of a Standard Consolidated Statistical Area (SCSA) all applications that propose to locate facilities within or within 15 miles of the boundary of any SMSA contained in the SCSA will be considered together . . . . Each application will be entitled to comparative consideration or to be included in a lottery in only one such area.

[8] In *Domestic Public Radio Services Order*, 60 FCC 2d at 551, we explained the purpose of our cut-off rule:

> [W]hat is commonly called our "cut-off" rule originated in our need for an orderly administrative procedure to control the disposition of our caseload. *See* 47 U.S.C. § 154(j). . . . [T]o provide early consolidation of competing applications and to prevent processing disruption by late filings, we require an application for a frequency, previously applied for, to be filed within a certain date. Competing applications filed after this date are considered to be "cut-off" from comparative consideration.

(citations omitted). *See also City of Angels Broadcasting, Inc. v. FCC*, 745 F.2d 656, 663 (D.C. Cir. 1984) ("The cut-off rule basically serves two purposes. First, it advances the interest of administrative finality. . . . Second, it aids timely . . . applicants by granting them a 'protected status'. . . . ") (citations omitted).

filing until April 20, 1988, pursuant to § 21.901(d)(4). Applications for the E or F channels which complied with specified restrictions could then be filed between April 20, 1988 and April 9, 1992. *See* ¶ 10, *infra.*

5. If an MMDS application is mutually exclusive with a 1983 application or authorized station, the applicable cut-off date is September 9, 1983. *Establishment of Multi-Channel Systems,* 48 Fed. Reg. 34,746. If there is no mutually exclusive 1983 application or authorized station, but there is a mutually exclusive, post-1983, previously proposed or authorized station, the applicable cut-off rule for the above-referenced applications, all of which were filed after October 31, 1990, is § 21.914, which provides that:

> Notwithstanding the provisions of § 21.31(b)(2)(i) and (ii) of this part, to be entitled to a random selection process or to comparative consideration with one or more conflicting applications, an [MDS] application . . . must be received by the Commission in a condition acceptable for filing on the same calendar day as the first of the conflicting applications is received by the Commission in a condition acceptable for filing.

47 C.F.R. § 21.914.[9]

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[9] Section 21.914, commonly referred to as the "same day calendar rule," was adopted in order to address the problems caused by the volume of MDS applications filed by speculators, which had resulted in delays in the licensing process and overburdened the Commission's limited resources. *See Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service*, 5 FCC Rcd 6410, 6413 (1990) (hereinafter *Wireless Cable Order*); *Order on Reconsideration,* 6 FCC Rcd 6764, 6771-72 (1991) (hereinafter *Wireless Cable Reconsideration Order*), *petition for review filed, United States Independent Microwave Television Ass'n v. FCC*, No. 91-1637 (D.C. Cir. filed Dec. 20, 1991) (held in abeyance by Court Order of February 21, 1992, pending action on second set of reconsideration petitions). Section 21.31(b) provides, in part, that in order to be entitled to comparative status:

> The application [must be] received by the Commission in a condition acceptable for filing by whichever "cut-off" date is earlier:
> (i) Sixty (60) days after the date of the public notice listing the first of the conflicting applications as accepted for filing, or
> (ii) One (1) business day preceding the day on which the Commission takes final action on the previously filed application (should the Commission act upon such application in the interval between thirty (30) and sixty (60) days after the date of

6. Station Design Requirement. Section 21.902(b)(3) requires each MDS applicant to engineer its proposed station to provide at least 45 dB of interference protection within the protected service areas[10] of all other authorized or previously proposed cochannel stations. 47 C.F.R. § 21.902(b)(3). Section 21.902(b)(4) requires each MDS applicant to engineer its station to provide at least 0 dB of interference protection within the protected service areas of all other authorized or previously proposed adjacent channel stations. 47 C.F.R. § 21.902(b)(4). Section 21.902(f) defines harmful interference as the ratio of desired signal to undesired signal present in the cochannel or adjacent channel, at the output of a reference receiving antenna oriented to receive the maximum desired signal.[11]

7. MDS Interference Studies. At the time the above-referenced applications were filed, in order to demonstrate compliance with § 21.902(b), and so that mutually exclusive determinations could be made, § 21.902(c)(1) of the Commission's rules required that an MDS applicant include with the application an analysis of the potential for harmful cochannel interference with any authorized or previously proposed station if the applicant's proposed transmitting antenna had an unobstructed electrical path to any part of the protected service area of any other authorized or previously proposed cochannel station, or if the applicant's proposed transmitter is within 50 miles of the transmitter coordinates of any other authorized or previously proposed cochannel station. 47 C.F.R. § 21.902(c)(1)(1991). In addition, § 21.902(c)(2) required that an MDS applicant include with the application an analysis of the potential for harmful adjacent channel interference if the applicant's proposed transmitting antenna had an unobstructed electrical path to any part of the protected service area of any other authorized or previously proposed adjacent channel station. 47 C.F.R. § 21.902(c)(2) (1991); *see* 47 C.F.R. § 21.902(a), (b), (d) and (f). Section 21.901(d)(7) further requires that each MDS application for the E or F channels include the applicant's written statement of the techniques that would be employed at the proposed station to avoid interference with the operation of adjacent channel stations. The applicant must also show what steps it has taken to comply with the requirements of § 21.902(a), which requires MDS applicants, licensees, and conditional licensees, to make exceptional efforts

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its public notice.)

47 C.F.R. § 21.31(b)(2). Except for the September 9, 1983 cut-off date, § 21.31(b) is the cut-off provision for MDS applications on the E or F channels filed between April 20, 1988 and October 31, 1990.

[10] Section 21.902(d) defines the protected service area for MDS stations.

[11] Cochannel harmful interference exists if a free space calculation of the ratio of desired signal to undesired signal is less than 45 dB. Adjacent channel harmful interference exists if a free space calculation of this ratio is less than 0 dB. 47 C.F.R. § 21.902(f).

to avoid harmful interference to other users and to avoid blocking potential adjacent channel stations in the same area and cochannel stations in nearby areas. 47 C.F.R. § 21.901(d)(7).

8. Service Requirement. In addition to submitting the required interference analyses to the Commission, an MDS applicant also must serve each required interference study upon the previously proposed or authorized station applicant, conditional licensee or licensee required to be studied, pursuant to § 21.902(g) of the Commission's rules. 47 C.F.R. § 21.902(g). The same rule requires that a list identifying each applicant, conditional licensee, and licensee served be submitted with the application.

9. ITFS Interference Protection. For MDS applications on the E or F channels which were filed beginning October 11, 1990 through December 29, 1991, the applicant also was required to file with the application, pursuant to 47 C.F.R. § 21.901(d)(1), an engineering analysis demonstrating a lack of harmful interference to each cochannel or adjacent channel Instructional Television Fixed Service (ITFS)[12] licensed station with a transmitter site within 50 miles of the proposed MDS transmitter site. In addition, a copy of the analysis had to be served on each affected ITFS licensee. In the alternative, the MDS applicant could submit a statement from the ITFS licensee stating that it did not object to the MDS operation.[13] *See Wireless Cable Order,* 5 FCC Rcd at 6413.

10. Location Restrictions. After the initial filing date of September 9, 1983, no filing period was designated until 1988. In accordance with § 21.901(d)(4) of the Commission's rules, the Commission then designated that MDS applications for E or F channel stations could be submitted for filing commencing April 20, 1988, *but only* for locations which were: (1) farther than 50 miles from any proposed location of an MDS

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[12] *See* 47 C.F.R. §§ 74.901-74.996.

[13] For applications filed before October 11, 1990, the MDS conditional licensee for the E or F channels is required to file, prior to commencing construction, a consent statement from all cochannel and adjacent channel ITFS licensees with transmitters within 50 miles of the proposed MDS transmitter. In the event the MDS conditional licensee cannot obtain such a statement, it is required to submit a Petition for Declaratory Ruling of lack of harmful interference, together with the required interference analyses. *Wireless Cable Order,* 5 FCC Rcd at 6438, n. 16; *see also People's Choice TV, Inc.*, 7 FCC Rcd 3628 (Dom. Fac. Div. 1992). The rule provision was later revised and codified as § 21.902(i). Thus, for MDS applications on the E, F or H channels filed on or after December 30, 1991, the required ITFS analysis or consent statement must be filed, pursuant to 47 C.F.R. § 21.902(i)(2)(1993), on or before the 60th day after the application is placed on public notice. *See Wireless Cable Reconsideration Order*, 6 FCC Rcd at 6771-72.

application for the E or F channels pending on April 19, 1988, or an existing authorized facility, and (2) farther than 15 miles from the boundary of a statistical area for which there was an MDS application for the E or F channels pending as of April 19, 1988, or an existing authorized facility. *Public Notice, Common Carrier Bureau Opens Filing Period For Multichannel Multipoint Distribution Service Applications*, 3 FCC Rcd 2661 (1988) (hereinafter *1988 Public Notice*). The *1988 Public Notice* also advised potential applicants that all applications must comply with the specified location restrictions, that grant of waivers of the location restrictions were not anticipated, and that applications failing to meet these location restrictions would be dismissed as unacceptable for filing. *Id.* at 2661-2662.

11. The 1988 location restrictions were a natural outgrowth of a policy that had provided certain efficiencies in the processing of MDS applications for channels 1, 2, and 2A. In 1981, we noted:

> At the inception of the MDS service in 1974 . . . we . . . established the presumption that no harmful interference would occur if stations were greater than 50 miles apart. If a proposed station were to be located 50 miles or closer to an existing station then we required (and still require) that the applicant submit an engineering showing of the possible impact it would have on the other station. The 50 mile presumption was primarily a processing standard to assist staff . . . . Our intention was to establish general standards which would permit authorization of operations to proceed in an expeditious manner.

R.L. Mohr, 85 FCC 2d at 604. *See also Sioux Valley*, 2 FCC Rcd at 7376. It was our experience prior to 1988 that there were fewer interference analyses submitted for authorized or previously proposed stations with transmitter sites beyond 50 miles of the subsequently proposed transmitter sites, but within the radio horizon, than for authorized or previously proposed stations within 50 miles. Without the need to review interference analyses for 1983 stations within 50 miles of the post-1983 MMDS applications' transmitter sites, scarce engineering resources instead could be used to review interference analyses filed for modification applications, or to make necessary engineering determinations on 1983 applications.

12. Summary. Thus, at the time the above-referenced applications were filed, applicants for new MMDS stations were required to file for a location farther than 50 miles from the location of any station proposed in an application which was pending on April 19, 1988, or of any existing facility, and farther than 15 miles from the boundary of a statistical area for which there was one or more MMDS applications pending on April 19, 1988, or an existing authorized facility. Applicants were permitted to file: (1) beyond 50 miles of a station proposed in an application pending on April 19, 1988 or an existing authorized station, as long as the location was also farther than 15 miles from the boundary of a statistical area for which there was one or more MMDS applications pending on April 19, 1988 or an existing authorized facility; (2) within 50

miles of a station proposed in an application filed after April 19, 1988; and (3) within the radio horizon with an unobstructed electrical path of any previously proposed or authorized station, proposed in an application filed after April 19, 1988. Applicants filing within these areas were required to file their applications before the applicable cut-off dates. Applicants also were required to engineer the proposed station to provide at least 45 dB of interference protection within the protected service areas of all other authorized or previously proposed cochannel stations and at least 0 dB of interference protection within the protected service area of all other authorized or previously proposed adjacent channel stations. In order to demonstrate compliance with these interference protection standards, applicants were directed to submit, as part of their application, interference studies which analyzed the potential for harmful cochannel and adjacent channel interference for all stations and pending applications within 50 miles or the radio horizon of the proposed station, and to serve those studies on the stations and applicants required to be studied. In addition, for applications filed beginning October 11, 1990 through December 29, 1991, the MMDS applicant was also required to submit with its application either an engineering analysis demonstrating a lack of harmful interference to each cochannel or adjacent channel ITFS licensee with a transmitter site within 50 miles of the proposed MMDS transmitter site, or a no objection letter from each ITFS station licensee. Section 21.20 of the rules explicitly put all applicants on notice that failure to comply with these requirements would result in the return of their application as unacceptable for filing. Notice was also provided in the *MMDS Allocation Order*, 94 FCC 2d 1203, and *MDS Technical Order*, 98 FCC 2d 68.

III. PETITIONS FOR RECONSIDERATION

13. Identical or substantially similar petitions for reconsideration were filed for the 4,330 returned MMDS applications at 62 different transmitter sites. Petitioners contend that their applications fully complied with all pertinent Commission rules, or else presented facts which would compel the grant of any necessary waivers. In support, petitioners chiefly assert that the interference analyses submitted with their applications demonstrated that there is no realistic possibility of harmful interference to existing or proposed stations, and that to the extent the proposed stations failed to comply with the location restrictions in the *1988 Public Notice*, Commission precedent supports a grant of a waiver. Petitioners also argue that the staff incorrectly applied the *1988 Public Notice* location restrictions and other Commission rules, and provided insufficient detail in the letters returning the applications.

14. There follows a description of the applications filed for each of these locations, the reasons for the staff's disposition of each application, and the arguments presented in the petitions. As discussed in detail below, we conclude that the applications were defective because each applicant failed to submit and serve the required interference analyses for authorized and previously proposed MMDS stations, and, in some cases, for authorized ITFS stations. The applications were also properly returned as unacceptable for filing because they were filed within the geographic area of

authorized or previously proposed MMDS stations, or within an MSA or its 15 mile buffer zone, in violation of the specific filing requirements set forth in the *1988 Public Notice*, and presented no grounds justifying the grant of a waiver. Finally, these applications were mutually exclusive with an authorized station or previously filed application with an earlier cut-off date, and thus, not entitled to comparative consideration even if in a form acceptable for filing.

15. Beloit, Alabama. On February 7, 1992, certain petitioners filed 132 applications proposing the same transmitter site at Beloit, Alabama. After reviewing each of the Beloit applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated March 3, 1993. The letters indicated that each application was returned because the applicant filed in the geographic area of other pending MMDS applications[14] and provided inadequate interference analyses due to their failure to consider and serve all previously proposed or authorized ITFS or MMDS stations. Reconsideration petitions for the 132 returned applications were filed on August 31, 1993.[15]

16. These 132 applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) three 1983 proposed MMDS stations, with applications pending on February 7, 1992, the filing date of the Beloit applications;[16] (2) two post-1983

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[14] This language refers to the applicant's non-compliance with the location restrictions contained in the *1988 Public Notice*. When this language is included in a return letter, it means that the applicant: (1) selected an incorrect transmitter site; (2) filed in an area not open for filing, and thus, on a date not designated by the Commission, in contravention of § 21.901(d)(4); and, (3) filed past the relevant cut-off date, in that the applicant selected a transmitter site which makes the proposed station mutually exclusive with authorized or previously proposed stations.

[15] Identical reconsideration petitions were filed for Application File Nos. 01346-CM-P-92 through 01350-CM-P-92; 01361-CM-P-92 through 01366-CM-P-92; 01372-CM-P-92 through 01390-CM-P-92; 01392-CM-P-92; 01418-CM-P-92 through 01440-CM-P-92; 01450-CM-P-92; 01453-CM-P-92 through 01456-CM-P-92; 01464-CM-P-92 through 01466-CM-P-92; 01475-CM-P-92 through 01498-CM-P-92; 01500-CM-P-92 through 01508-CM-P-92; 01522-CM-P-92; 01530-CM-P-92 through 01546-CM-P-92; 01556-CM-P-92 through 01558-CM-P-92; 01576-CM-P-92 through 01583-CM-P-92; 01602-CM-P-92 through 01607-CM-P-92; and 01618-CM-P-92. The Beloit petitions were filed over five months after the date of the return letters, and thus, were untimely. Petitioners argue that delays in receiving the return letters and delays in filing the instant petitions resulted from the Commission's mailing of the return letters to the applicants and not to their "contact representative."

[16] Application File Nos. 00194-CM-P-83; 00355-CM-P-83; and 01253-CM-P-83.

authorized MMDS stations;[17] and (3) 116 post-1983 previously proposed MMDS stations with applications pending on February 7, 1992.[18] These applications failed to include interference studies, as required by § 21.902(b) and (c), for one authorized MMDS station and 119 previously proposed MMDS stations with applications pending. In addition, the interference studies submitted with the applications were inadequate in that they failed to include free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the previously proposed or authorized stations as required by § 21.902(c), (d) and (f). *See* § 21.902(e). The applicants also failed to satisfy the requirements for service of interference studies as stipulated by § 21.902(g). Thus, the Beloit applicants failed to demonstrate that the station proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

17. The Beloit petitioners primarily assert that the returned applications contained all the necessary elements, including the required interference analyses, for the grant of a waiver of the *1988 Public Notice* location restrictions. Petitioners contend that, because all required interference analyses were supplied and showed that no harmful interference would result from granting the applications, the Commission acted arbitrarily and capriciously in returning the applications without taking a "hard look" at the applicants' eligibility for a waiver and without a careful review of the applicants' showing, as required by *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).[19]

18. Cullman, Alabama. On December 31, 1991, certain petitioners filed 31 applications proposing the same transmitter site at Cullman, Alabama. After reviewing each of the 31 Cullman applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated June 30, 1992.

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[17] WLW737 and WMI379 in Demopolis, Alabama.

[18] Including, but not limited to, Application File Nos. 60512-CM-P-91; 52521-CM-P-90; 52520-CM-P-90; and 01535-CM-P-92.

[19] Petitioners also argue that the Commission: (1) failed to indicate which other applications for the same geographic area were filed before the Beloit applications, thereby denying petitioners' rights to challenge these prior filed applications, citing *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945); (2) incorrectly applied the "so-called 15/50 mile rules" *vis-a-vis* existing or proposed stations; and (3) failed to provide sufficient detail and enunciate the specific reasons for the return of the applications, contrary to the requirements of reasoned and articulated decision making. Petitioners further argue that the petitions, which were untimely, should be accepted because the Commission failed to return the applications to the designated contact representative, which caused delays in both the receiving of return notifications and the filing of petitions.

The letters indicated that each application was returned because the applicant: (1) selected a transmitter site which makes the proposed station mutually exclusive with an authorized station or previously proposed application; and (2) filed a waiver request that failed to comply with the requirements of § 21.19. Reconsideration petitions were filed on October 9, 1992 for the 31 returned applications.[20]

19. These 31 applicants selected a transmitter site within the Birmingham, Alabama MSA, and thus, are mutually exclusive with and cut-off by authorized and previously proposed stations within that MSA, pursuant to § 21.901(d)(5). Furthermore, these 31 applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) two 1983 authorized MMDS stations;[21] (2) 95 1983 proposed MMDS stations, with applications pending on December 31, 1991, the filing date of the Cullman applications;[22] and (3) ten post-1983, previously proposed MMDS stations, with

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[20] Reconsideration petitions were filed for Application File Nos. 52749-CM-P-92 through 52755-CM-P-92; 52792-CM-P-92 through 52797-CM-P-92; and 52800-CM-P-92 through 52817-CM-P-92. The petitions were filed more than three months after the date of the return notification letters and thus, are untimely. Petitioners attach the declaration of the secretary of the contact representative named in the petitioned applications, stating that she did not receive the return letters until September 22, 1992. Petitioners argue that the untimely petitions should be accepted because the delay in delivery or misdating of the return letters made compliance with the 30 day filing period impossible and because petitioners filed within 30 days of receiving the return letters. Petitioners cite *Microwave Communications, Inc. (MCI) v. FCC*, 515 F.2d 385 (D.C. Cir. 1974) and *Foods and Beverage Trades Dept.*, AFL-CIO, 47 Rad. Reg. 2d 383 (1980), for the propositions that public notice of an order is given only when the decision becomes available to the litigants, and acceptance of a petition is required where a defect in mailing notification makes it impossible for the affected party to comply with the established deadline. No assertion was made concerning receipt of the return notification letters by the Cullman applicants.

Reconsideration petitions were not filed for Application File Nos. 52767-CM-P-92 through 52791-CM-P-92; 52818-CM-P-92 through 52834-CM-P-92; 52756-CM-P-92 through 52766-CM-P-92; and 52701-CM-P-92 through 52748-CM-P-92, which proposed the same transmitter site at Cullman, and were filed and returned on the same dates as the petitioned applications.

[21] WLR564 and WLW773 in Huntsville, Alabama.

[22] Including, but not limited to, Application File Nos. 04539-CM-P-83 (Huntsville, Alabama); 08539-CM-P-83 (Birmingham, Alabama); and 02145-CM-P-83 (Gadsden, Alabama). Application File No. 08539-CM-P-83 was subsequently granted (WHT710).

applications pending on December 31, 1991.[23] These 31 Cullman applications failed to include interference studies, as required by § 21.902(b) and (c), for one authorized MMDS station and 105 previously proposed MMDS stations. In addition, the interference study submitted with the applications was inadequate because it failed to include free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the authorized or previously proposed stations, as required by § 21.902(c), (d) and (f). *See* § 21.902(e). The applicants also failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, these 31 Cullman applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

20. The Cullman petitioners assert that the returned applications contained the necessary elements for granting a waiver of the 50 mile location restrictions, including all required interference analyses. Chiefly, petitioners contend that the required interference analyses filed with the Commission demonstrated that no harmful interference would result from grant of the applications,[24] and point to the fact that no objections were received from the applicants upon whom the interference analyses were served.[25] Petitioners claim, moreover, that the distance between the proposed Cullman site and the other previously proposed or authorized stations prevents the occurrence of harmful interference, and also precludes these previously proposed or authorized stations from providing reliable service to the Cullman community. Petitioners further argue that their waiver request fully complied with Commission rules by showing the lack of a reasonable alternative site, and that without grant of the waiver, reliable service to the proposed service area would be effectively denied. Thus, petitioners contend that the Commission acted arbitrarily and capriciously by returning the

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[23] Application File Nos. 52286-CM-P-92 through 52295-CM-P-92 (Gadsden, Alabama).

[24] Petitioners cite *Lawrence N. Brandt*, 7 FCC Rcd 4511 (Dom. Fac. Div. 1992), and *Marylan J. Benson*, 7 FCC Rcd 15 (Dom. Fac. Div. 1992), as confirmation of the Commission's policy of permitting waiver of the 50 mile location restrictions upon a showing of lack of harmful interference to cochannel or adjacent channel stations operating within 50 miles or the radio horizon of a proposed transmitter site, and to distinguish the instant waiver request from two that were denied for having failed to provide all of the required interference analyses.

[25] In addition, petitioners maintain that the Commission has previously granted an MDS application, notwithstanding possible interference to the signals within the protected service area of another facility, when the applicant's engineering analysis and agreement with potentially affected parties overcame the presumption of harmful interference, citing *Austin Movie and Sports Cable, Inc.*, 4 FCC Rcd 6174 (Dom. Fac. Div. 1989).

applications without giving them a "hard look," and that the Commission's failure to review the applications carefully results in the adoption of "more stringent separation standards *ex post facto,*" and defeats the underlying purpose of the interference analysis rules and the *1988 Public Notice* requirements.

21. Goshen, Alabama. On January 17, 1992, certain petitioners filed 98 applications proposing the same transmitter site at Goshen, Alabama. After reviewing each of the Goshen applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated March 3, 1993. The letters indicated that each application was returned because the applicant filed in the geographic area of other authorized or pending MMDS applications. The letter also indicated that the applicant's waiver request was denied due to failure to comply with the requirements of § 21.19, and that without a waiver, the application was unacceptable for filing. Reconsideration petitions for the 98 returned applications were filed on August 31, 1993.[26]

22. These 98 applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) one 1983 authorized MMDS station;[27] (2) 24 1983 proposed MMDS stations, with applications pending on January 17, 1992, the filing date of the Goshen applications;[28] and (3) 68 post-1983, previously proposed MMDS stations, with

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[26] Reconsideration petitions were filed for Application File Nos. 00696-CM-P-92 through 00707-CM-P-92; 00712-CM-P-92 through 00720-CM-P-92; 00723-CM-P-92 through 00727-CM-P-92; 00734-CM-P-92 through 00740-CM-P-92; 00747-CM-P-92; 00751-CM-P-92 through 00761-CM-P-92; 00793-CM-P-92 through 00796-CM-P-92; 00811-CM-P-92 through 00813-CM-P-92; 00822-CM-P-92 through 00830-CM-P-92; 00841-CM-P-92 through 00850-CM-P-92; 00855-CM-P-92 through 00863-CM-P-92; 00865-CM-P-92 through 00867-CM-P-92; 00878-CM-P-92 through 00891-CM-P-92; and 53235-CM-P-92. These petitions were filed more than five months after the date of the return notification letters sent to petitioners, and thus, are untimely. Petitioners argue that because some return letters were sent to the applicants and not the contact representative specified in the applications, the Commission has "created the possibility of insufficient notice of its actions," requiring reinstatement of the applications under *McElroy Electronics v. FCC,* 990 F.2d 1351 (D.C. Cir. 1993). Petitioners also point to the fact that some applicants in other markets may have experienced difficulties in receiving a copy of their returned applications. Petitioners offer no proof that they experienced any such delay.

[27] WMH505 in Montgomery, Alabama.

[28] These include 22 applications for Montgomery, Alabama, one application for Gadsden, Alabama, and one application for Dothan, Alabama (including, but not limited to, Application File Nos. 13790-CM-P-83; 09976-CM-P-83; 08574-CM-P-83; 12891-CM-P-83; 08185-CM-P-83; 07770-CM-P-83; and 15875-CM-P-83). Application File No.

applications pending on January 17, 1992.[29] These 98 applications failed to include interference studies, as required by § 21.902(b) and (c), for 90 previously proposed MMDS stations. In addition, the interference studies submitted with the applications were inadequate because they failed to submit free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the previously proposed or authorized stations as required by § 21.902(c), (d) and (f). *See* § 21.902(e). The applicants also failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, the Goshen applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

23. The Goshen petitioners primarily assert that the returned applications contained all the necessary elements, including the required interference analyses, for the granting of a waiver. Petitioners contend that, because all required interference analyses were supplied and showed that no harmful interference would result from granting the applications, the Commission acted arbitrarily and capriciously in returning the applications without a "hard look" at the applicants' eligibility for a waiver and without a careful review of the applicants' showing.[30] Petitioners also argue that a waiver would serve the public interest because previously filed MMDS stations cannot technically provide reliable service to Goshen, and that there are no reasonable alternative sites which would provide reliable service to Goshen. Petitioners further assert that the Commission failed: (1) to indicate which applications, if any, established any valid cut-off period, thereby violating the applicants' *Ashbacker* rights; (2) to provide sufficient detail of the specific reasons for the return of the applications; (3) to enunciate the reasons for the return of the applications, contrary to the requirements of reasoned and articulated decision making; and (4) to correctly apply the location restrictions.[31]

15875-CM-P-83 (Montgomery, Alabama) was subsequently granted.

[29] The post-1983 proposed stations include 65 applications for Andalusia, Alabama, one application for Ariton, Alabama, and two applications for Montgomery, Alabama (including, but not limited to, Application File Nos. 60507-CM-P-91 through 60532-CM-P-91; 00439-CM-P-92; and 51298-CM-P-92).

[30] In support, petitioners note that the Commission has granted MMDS applications despite potential interference when an applicant shows such potential interference problems have been resolved, citing *Austin Movie.*

[31] Additionally, petitioners attempt to incorporate, by reference, arguments made in an "above-referenced petition" filed earlier, although no filing date or application file is supplied. A review of Commission records reveals that no reconsideration petitions were filed previously by any of these Goshen applicants. Thus, the Commission has considered only those arguments made in the instant petitions.

24. Willcox, Arizona. On July 2, 1991, certain petitioners filed four applications, proposing the same transmitter site at Willcox, Arizona.[32] After reviewing these applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated June 23, 1993. The letters indicated that each application was returned because: (1) the area proposed was not open for filing pursuant to § 21.901(d)(4) as it did not meet the criteria established in the *1988 Public Notice*, which specifically states that an applicant may not file in a geographic area of an authorized MMDS station or a pending MMDS application; and (2) the application contained inadequate interference analysis pursuant to § 21.902 due to applicant's failure to serve all affected parties pursuant to § 21.902(g) and/or failure to consider all previously proposed or authorized ITFS or MMDS stations pursuant to § 21.902(c) and/or 21.902(i). Reconsideration petitions for the four applications were filed on August 31, 1993.[33]

25. These four applications propose a transmitter site that is within 50 miles or the radio horizon of two post-1983, previously proposed MMDS stations, with applications pending on July 2, 1991, the filing date of the Willcox applications.[34] The Willcox applications failed to include interference studies, as required by § 21.902(b) and (c), for either of the post-1983, previously proposed MMDS stations with applications pending. In addition, the applicants failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, the applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

26. Petitioners assert that the Willcox applications fully complied with the Commission's rules and waiver requirements. They further argue that a waiver would serve the public interest because previously authorized or proposed MMDS facilities could not reliably serve Willcox. For these reasons, petitioners maintain that a decision to deny them a waiver would be arbitrary and capricious and that a form letter

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[32] Application File Nos. 60365-CM-P-91; 60373-CM-P-91; 60379-CM-P-91; and 60382-CM-P-91.

[33] These reconsideration petitions were filed more than two months after the date of the return notification letters sent to the applicants and thus, are untimely. While the petitions refer to earlier filed petitions, no such petitions were ever received by the Commission. Petitioners also claim that because some return letters were returned to the applicants and not the contact representative specified in the applications, and because some return letters in some markets allegedly had other applications or no applications attached, the Commission has "created the possibility of insufficient notice of its actions" and is therefore required to reinstate the applications under *McElroy Electronics*.

[34] Application File Nos. 55210-CM-P-91 and 55211-CM-P-91.

rejection does not meet the standard for a "hard look" as required by *WAIT Radio.* Petitioners further argue that their *Ashbacker* rights were violated because they were not told which prior applications established the cut-off period and that they were therefore unable to challenge these applications. Petitioners further claim that the Commission did not properly enunciate its rules, policies and reasons for return of the Willcox applications and therefore did not engage in reasoned analysis in evaluating the applications in violation of *McElroy Electronics.* Petitioners also maintain that the Commission incorrectly applied the "so-called 15/50-mile rules" relating to existing or proposed MMDS authorizations.

27. Gurdon, Arkansas. On October 28, 1991, certain petitioners filed 132 applications proposing the same transmitter site at Gurdon, Arkansas. After reviewing each of the Gurdon applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated October 14, 1992. The letters indicated that each application was returned because the applicant filed in the geographic area of other pending MMDS applications. Reconsideration petitions were filed on October 30, 1992 for the 132 returned applications.[35]

28. These 132 applications propose a transmitter site that is within 50 miles or the radio horizon of one 1983 proposed MMDS station[36] and 98 post-1983, previously proposed MMDS stations, with applications pending on October 28, 1991, the filing date of the Gurdon applications.[37] These applications failed to include interference studies, as required by § 21.902(b) and (c), for 98 previously proposed MMDS stations with applications pending. The interference study that was submitted was inadequate in that it did not include free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the previously proposed or authorized stations as required by § 21.902(c), (d) and (f). *See* § 21.902(e). In addition, the applicants failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, the Gurdon applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

29. The Gurdon petitioners primarily assert that the returned applications were acceptable for filing and contained all the necessary elements, including the required

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[35] Petitions were filed for Application File Nos. 51158-CM-P-92 through 51289-CM-P-92. Duplicate petitions were submitted for the same application by the same attorney in two instances.

[36] Application File No. 13435-CM-P-83.

[37] These 98 applications include Application File Nos. 50015-CM-P-90 and 59882-CM-P-91 through 59979-CM-P-91. Application File No. 50015-CM-P-90 (WLW705 in Hot Springs, Arkansas) was subsequently granted.

interference analyses, for grant of a waiver of the location restrictions.[38] Petitioners contend that all required interference analyses were supplied and demonstrated that no harmful interference would result from grant of the applications.[39] Petitioners further assert that other MMDS stations cannot provide reliable to service to Gurdon, given their distance from the community, and that denial of their waiver request would effectively deny service to Gurdon. Thus, petitioners conclude that the Commission acted arbitrarily and capriciously in returning the applications without a "hard look" at the applicants' eligibility for a waiver, and adopted more stringent separation standards *ex post facto.*

30. Hamburg, Arkansas. On July 16, 1991, certain petitioners filed 56 applications proposing the same transmitter site at Hamburg, Arkansas. After reviewing each of the Hamburg applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated June 20, 1992. The letters indicated that each application was returned because the applicant: (1) filed in the geographic area of an authorized MMDS station; and (2) failed to meet the requirements in § 21.19 for grant of a waiver, and that without a waiver, the application failed to comply with the Commission's rules and thus, was unacceptable for filing. Reconsideration petitions were filed on August 11, 1992 for the 56 returned applications.[40]

31. These 56 applications propose a transmitter site that is within 50 miles or the

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[38] Petitioners cite *Lawrence N. Brandt* and *Marylan J. Benson* as confirmation of the Commission's policy permitting waiver of the 50 mile location restriction.

[39] Petitioners note that the Commission has previously granted MMDS applications notwithstanding potential interference when an applicant shows such potential interference problems have been resolved, citing *Austin Movie.*

[40] Reconsideration petitions were filed for Application File Nos. 60677-CM-P-91 through 60732-CM-P-91. These petitions were filed more than three weeks after expiration of the 30-day statutory period for filing of such petitions, and thus, were untimely. Petitioners attached the declaration of the secretary of the contact representative specified in the returned applications, stating that she did not receive the return letters until July 15, 1992. Petitioners argue that the untimely petitions should be accepted because the delay in delivery or misdating of the return letters made compliance with the 30 day filing period impossible and they filed within 30 days of receiving the return letters. Petitioners cite *MCI v. FCC* and *Foods and Beverage Trades Dept.* for the propositions that public notice of an order is given only when the decision becomes available to the litigants, and that acceptance of a petition is required where a defect in mailing notification makes it impossible for the affected party to comply with the established deadline. No assertion was made concerning receipt of the return notification letters by the applicants.

radio horizon of: (1) six 1983 proposed MMDS stations,[41] with applications pending on July 16, 1991, the filing date of the Hamburg applications; and (2) 21 post-1983 previously proposed MMDS stations,[42] with applications pending on July 16, 1991. These applications failed to include interference studies, as required by § 21.902(b) and (c), for 24 previously proposed MMDS stations with applications pending. The interference studies that were submitted were inadequate because they failed to submit free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service areas of the authorized or previously proposed stations as required by § 21.902 (c), (d) and (f). *See* § 21.902(e). These applicants also failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, the Hamburg applicants failed to demonstrate that the station proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

32. The Hamburg petitioners assert that the returned applications contained all the necessary elements for granting a waiver of the 50 mile restriction contained in the *1988 Public Notice*, including all required interference analyses.[43] Petitioners further assert that their interference analyses demonstrate no realistic possibility of harmful interference to the existing or proposed stations. In support of their argument, petitioners note that the Commission has granted waivers of the 50 mile restriction when the applicant's engineering analysis and agreement with potentially affected parties overcame the presumption of harmful interference, citing *Austin Movie*. The petitioners contend that the Commission acted arbitrarily and capriciously by returning the applications without a "hard look," and claim that denial of the requested waiver would defeat the underlying purpose of the rule and *1988 Public Notice* requirements, and effectively deny reliable service to Hamburg. Petitioners also maintain that the Commission's dismissal of the applications, which purportedly demonstrate no harmful

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[41] Application File Nos. 06920-CM-P-83; 10872-CM-P-83; 10634-CM-P-83; 13997-CM-P-83; 08723-CM-P-83; and 02157-CM-P- 83. Application File Nos. 08723-CM-P-83; 02157-CM-P-83; and 10872-CM-P-83 were granted subsequent to the filing of the Hamburg applications (Stations WMI276 and WLW858 in Greenville, Mississippi and WMH357 in Monroe, Louisiana).

[42] These applications include 19 applications for Greenville, Mississippi, and 2 applications for Monticello, Arkansas (including, but not limited, to Application File Nos. 60084-CM-P-91; 60085-CM-P-91; 60552-CM-P-91; 52087-CM-P-91; 52179-CM-P-91; 55649-CM-P-91; 53444-CM-P-91; 55858-CM-P-91; 52890-CM-P-91; and 55214-CM-P-90).

[43] Petitioners cite *Lawrence N. Brandi* and *Marylan J. Benson* as confirmation of Commission policy permitting waiver of the 50 mile location restriction upon a showing of lack of harmful interference to cochannel or adjacent channel stations operating within 50 miles or the radio horizon of a transmitter site.

interference, is procedurally unfair and adopts more stringent separation standards *ex post facto*.

33. Magnolia, Arkansas. On June 19, 1991, certain petitioners filed 98 applications proposing the same transmitter site at Magnolia, Arkansas.[44] After reviewing each of these 98 Magnolia applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated September 25, 1992. The letters indicated that each application was returned because: (1) the application did not meet the criteria established in the *1988 Public Notice* and was filed in an area of a pending MMDS application which was not open for filing pursuant to § 21.901(d)(4); and (2) each application failed to meet the requirements in § 21.19 for grant of a waiver, and that without a waiver, the application was unacceptable for filing. Reconsideration petitions were filed on October 22, 1992 for the 98 returned applications.

34. These 98 applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) 20 1983 proposed MMDS stations with applications pending on June 19, 1991, the filing date of the Magnolia applications;[45] and (4) 66 post-1983, previously proposed MMDS stations, with applications pending on June 19, 1991.[46] These 98 Magnolia applications failed to include interference studies, as required by § 21.902(b) and (c), for one authorized MMDS station and 84 previously proposed MMDS stations with applications pending. In addition, the interference studies that were submitted were inadequate because they did not include free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service areas of previously proposed or authorized stations as required by § 21.902 (c), (d) and (f). *See* § 21.902(e). The applicants also failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, these 98

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[44] Application File Nos. 59882-CM-P-91 through 59979-CM-P-91.

[45] Including, but not limited to, Application File Nos. 01030-CM-P-83; 04231-CM-P-83; 15583-CM-P-83; 14522-CM-P-83; 06976-CM-P-83; 10714-CM-P-83; 10923-CM-P-83; 12928-CM-P-83; 16104-CM-P-83; 05845-CM-P-83; 05959-CM-P-83; 05066-CM-P-83; 16541-CM-P-83; 13843-CM-P-83; 05262-CM-P-83; and 10033-CM-P-83. Application File Nos. 04231-CM-P-83 and 15583-CM-P-83 were subsequently granted (WHM516 and WMH396 in Texarkana, Texas).

[46] Including, but not limited to, Application File Nos. 54370-CM-P-91; 53299-CM-P-91; 53640-CM-P-91; 53921-CM-P-91; 53884-CM-P-91; 53221-CM-P-91; 53140-CM-P-91; 55136-CM-P-91; 53881-CM-P-91; 52432-CM-P-91; 52450-CM-P-91; 54408-CM-P-91; 52532-CM-P-91; 53223-CM-P-91; 54567-CM-P-91; 52583-CM-P-91; 53781-CM-P-91; 53139-CM-P-91; 52582-CM-P-91; 52584-CM-P-91; 53882-CM-P-91; 53879-CM-P-91; 53968-CM-P-91; 54471-CM-P-91; and 53804-CM-P-91. Application File No. 53299-CM-P-91 was subsequently granted (WMI312 in El Dorado, Arkansas).

applications failed to demonstrate that the station proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

35. On reconsideration, the Magnolia petitioners argue that their applications contained the necessary elements, as specified in the *1988 Public Notice*, for the grant of a waiver pursuant to § 21.19, and that the Commission did not engage in reasoned analysis in evaluating their applications. They assert that the interference analyses submitted with the applications demonstrate that the proposed station would not cause harmful interference to then existing MMDS operations or previously proposed applicants. Petitioners further maintain that a waiver would serve the public interest because previously filed MMDS facilities could not reliably serve Magnolia. For these reasons, petitioners claim that a decision to deny them a waiver would be arbitrary and capricious.

36. Ten months after filing their original requests for reconsideration, twelve petitioners filed supplemental petitions.[47] Petitioners argue that because the Commission did not indicate in the return letters which applications had been earlier filed, nor which were acceptable for filing, applicants were unable to challenge the qualifications of the previously filed applications, in violation of their *Ashbacker* rights. They also claim that a new engineering statement further proved that there would be no harm caused by applicants' proposed Magnolia station, but failed to provide a copy of the statement.

37. Mountain Home, Arkansas. On July 23, 1991, certain petitioners filed 100 applications proposing the same transmitter site at Mountain Home, Arkansas. After reviewing each of the Mountain Home applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated October 7, 1992. The letter to each E channel applicant, and to one of the F channel applicants, indicated that the applicant filed in the geographic area of a pending MMDS application, and thereby filed in an area not open for filing pursuant to § 21.902(d)(4) as it did not meet the criteria established in the *1988 Public Notice*. The letter to the remaining F channel applicants indicated that the applicant submitted an inadequate interference analysis due to failure to consider all previously proposed or authorized ITFS or MMDS stations, pursuant to § 21.902.[48] In addition, the letter to each applicant

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[47] Application File Nos. 59969-CM-P-91 through 59979-CM-P-91; and 59909-CM-P-91. The supplemental petitions were filed beyond the 30-day statutory deadline for the filing of such petitions, and thus, are untimely.

[48] The F channel petitioners argue that because the E and F channel applications were identical except for the channel group specified, either both groups of applications should be rejected on the basis of inadequate interference analyses, or both sets of applications accepted, the latter reasoning being urged by the petitioners. The F channel petitioners further argue that the arbitrary and capricious standard requires the

indicated that the applicant failed to file a duplicate copy of the application, in violation of § 21.6(d). One hundred and one reconsideration petitions were filed on November 6, 1992 for the 100 returned applications.[49]

38. The returned applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) one 1983 previously proposed MMDS station, whose application was pending on July 23, 1991, the filing date of the Mountain Home applications;[50] and (2) 124 post-1983, previously proposed MMDS stations, with applications pending on July 23, 1991.[51] These Mountain Home applications failed to include interference studies, as required by § 21.902(b) and (c), for 123 previously proposed MMDS stations, with applications pending on July 23, 1991. In addition, the interference studies submitted with the applications were inadequate in that they failed to submit free space calculations of the desired to undesired signal ratio for each reference receiving antenna within the protected service areas of the previously proposed stations, as required by § 21.902(c), (d) and (f). *See* § 21.902(e). The applicants also failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, the Mountain Home applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to previously proposed stations.

39. On reconsideration, petitioners assert that they performed and served adequate interference analyses for all existing or proposed MMDS stations within 50 miles, and that these analyses demonstrate that the proposed station would not cause harmful interference. Moreover, petitioners claim that potentially affected parties raised no objections to the proposed Mountain Home transmitter site. Petitioners further

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Commission to be consistent in its treatment of similar applications, citing *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965). As shown below, while it was not specified as grounds for return in the return letters, the E channel applicants also failed to submit interference analyses as required by § 21.902.

[49] Reconsideration petitions were filed for Application File Nos. 60916-CM-P-91 through 61015-CM-P-91. A duplicate petition was filed for Application File No. 60993-CM-P-91.

[50] Application File No. 00626-CM-P-83 (Mountain View, Arkansas).

[51] These 124 proposed stations include 50 applications for West Plains, Missouri (including, but not limited to, Application File Nos. 50009-CM-P-91 through 50040-CM-P-91) and 74 applications for Harrison, Arkansas (including, but not limited to Application File Nos. 57969-CM-P-91 through 58005-CM-P-91). Application File No. 50479-CM-P-91 has since been granted (WMH793, West Plains). Application File Nos. 55551-CM-P-91 (Harrison), 55607-CM-P-91 (Harrison), and 50018-CM-P-91 (West Plains) have been chosen as tentative lottery selectees.

contend that their applications conclusively justified a waiver of the *1988 Public Notice* 50 mile location restriction, because there is "no realistic possibility" of harmful interference, and a waiver would serve the public interest because the other stations identified in the engineering analyses cannot reliably serve Mountain Home. Petitioners also assert that granting the waiver would effectuate the underlying purpose of the 50 mile location restriction, which is to avoid harmful interference. Thus, petitioners argue that in merely checking three boxes on a form to return the applications and denying the waiver requests, the Commission's action was arbitrary and capricious and constituted summary denial of the applications without careful review.[52] Finally, the Mountain Home petitioners maintain that interference analyses, and not the fixed distance separation standards set by the *1988 Public Notice*, are the mechanism for applicants to demonstrate non-interference.[53]

40. Santa Rosa, California. On April 2, 1991, certain petitioners filed 14 applications proposing the same transmitter site at Santa Rosa, California. After reviewing the Santa Rosa applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated October 21, 1992. The letters indicated that each application was returned because it failed to comply with the waiver requirements in § 21.19 and that without the grant of a waiver, each application failed to comply with Commission rules, and thus, was unacceptable for filing. Reconsideration petitions for the 14 returned applications were filed on November 20, 1992.[54]

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[52] As further proof that the Commission failed to give their waiver request a "hard look," petitioners point to the fact that the return letters did not specifically cite the failure to comply with the requirements for a waiver as a reason for returning the applications. After a thorough review of the petitioners' showing in support of their waiver request, we conclude that the staff properly denied the request for the reasons stated in Section IV of this Order.

[53] Petitioners also assert that the Commission has historically waived procedural requirements, such as the filing of a duplicate copy of the application, where the public interest calls for consideration of the application on the merits, citing *WSTE-TV Inc. v. FCC*, 566 F.2d 333 (D.C. Cir. 1977). Because we find that the Mountain Home applications were properly returned due to violation of other Commission rules, including filing within 50 miles of a 1983 application and failing to submit the required interference studies, we need not further address this procedural argument here.

[54] Reconsideration petitions were filed for Application File Nos. 58624-CM-P-91; 58625-CM-P-91; 58627-CM-P-91 through 58634-CM-P-91; and 58636-CM-P-91 through 58639-CM-P-91. No petition was filed for Application File No. 58635-CM-P-91, which also proposed the same transmitter site at Santa Rosa and was filed and returned on the same dates as the petitioned applications.

41. These 14 applicants selected a transmitter site within the San Francisco MSA, and thus, are mutually exclusive with and cut-off by authorized stations within that MSA, pursuant to § 21.901(d)(5). The returned applications also proposed a transmitter site that is within 50 miles or the radio horizon of six 1983 previously proposed MMDS stations[55] and 55 post-1983, previously proposed MMDS stations, with applications pending on April 2, 1991, the filing date of the Santa Rosa applications.[56] The Santa Rosa applications failed to include interference studies, as required by § 21.902(b) and (c), for two post-1983, previously proposed MMDS stations. In addition, the interference studies submitted with the applications were inadequate because they failed to include free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the authorized or previously proposed stations as required by § 21.902(c), (d) and (f). *See* § 21.902(e). These applicants also failed to comply with the requirements of § 21.901(d)(1) for ITFS interference protection because free space calculations were not submitted for each registered receive site of Station WSA39 (Davis, California), an ITFS station with an authorized transmitter site within 50 miles of the Santa Rosa proposed transmitter site. The applicants also failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, these Santa Rosa applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to the previously proposed stations.

42. The Santa Rosa petitioners assert that they fully complied with the Commission's rules and waiver requirements. Petitioners further state that their waiver request included all necessary elements, as required by § 21.19, for a waiver of the fifty mile location restriction contained in the *1988 Public Notice*.[57] Petitioners also

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[55] Application File Nos. 11373-CM-P-83; 00713-CM-P-83; 00223-CM-P-83; 01150-CM-P-83; 03563-CM-P-83; and 05834-CM-P-83.

[56] These were two proposed stations at Santa Rosa (Application File Nos. 56789-CM-P-91 and 56790-CM-P-91) and 53 proposed stations at Ukiah, California (including but not limited to, Application File Nos. 52749-CM-P-90 through 52775-CM-P-90).

[57] In support, petitioners attach an affidavit from Richard L. Vega, President of a telecommunications consulting company. Mr. Vega cites two examples where, he argues, the Domestic Facilities Division granted MDS single channel applications in areas within close proximity (*i.e.*, less than 40 miles) to other MDS licensees. However, the cited examples are inapplicable to these returned Santa Rosa applications. The single channel applications described by Mr. Vega were filed prior to the adoption of a definition of MDS protected service areas in the 1984 *MMDS Technical Order*. In each case cited in the affidavit, the issue was the size of the geographic area in which previously authorized MDS stations would be protected from harmful interference by a subsequently filed application. At the time the Santa Rosa applications were filed, this issue was determined by § 21.902(d), which defines the protected service area for MDS

contend that because all required interference analyses were supplied and showed that no harmful interference would result from granting the applications, the Commission acted arbitrarily and capriciously in returning the applications without a "hard look" at the applicants' eligibility for a waiver and without a careful review of the applicants' showings. Petitioners also maintain that granting their waiver would serve the public interest because the authorized or previously proposed MMDS stations cannot reliably serve Santa Rosa.

43. Fort Morgan, Colorado. On July 30, 1991, certain petitioners filed 96 applications proposing the same transmitter site at Fort Morgan, Colorado. After reviewing the Fort Morgan applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated May 12, 1993. The letters indicated that each application was returned because the applicants filed inadequate interference analyses pursuant to § 21.902 due to failure to serve all affected parties pursuant to § 21.902(g), and/or failure to consider all previously proposed or authorized ITFS or MMDS stations pursuant to § 21.902(c) and/or 21.902(i). Reconsideration petitions for the 96 returned applications were filed on June 11, 1993, July 27, 1993, and August 31, 1993.[58]

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stations. In addition, the 50 mile requirement enunciated in the *1988 Public Notice* is not a requirement for single channel MDS stations in general, and specifically was not a requirement for these two single channel applications.

[58] Individual reconsideration petitions were filed on June 11, 1993 for Application File Nos. 61102-CM-P-91; 61103-CM-P-91; 61106-CM-P-91; 61111-CM-P-91; 61113-CM-P-91; 61122-CM-P-91; 61125-CM-P-91; 61132-CM-P-91; 61134-CM-P-91; 61135-CM-P-91; 61136-CM-P-91; 61137-CM-P-91; 61140-CM-P-91; 61144-CM-P-91; 61145-CM-P-91; 61158-CM-P-91; 61161-CM-P-91; 61164-CM-P-91; 61176-CM-P-91; 61181-CM-P-91; 61192-CM-P-91; and 61197-CM-P-91. A joint petition for reconsideration was filed on July 27, 1993 for Application File Nos. 61123-CM-P-91 and 61125-CM-P-91. On August 31, 1993, a joint petition was filed on behalf of these 23 applicants and for Application File Nos. 61099-CM-P-91 through 61101-CM-P-91; 61104-CM-P-91; 61107-CM-P-91 through 61110-CM-P-91; 61112-CM-P-91; 61114-CM-P-91 through 61121-CM-P-91; 61123-CM-P-91; 61124-CM-P-91; 61126-CM-P-91 through 61131-CM-P-91; 61133-CM-P-91; 61138-CM-P-91 through 61139-CM-P-91; 61141-CM-P-91 through 61143-CM-P-91; 61146-CM-P-91 through 61157-CM-P-91; 61159-CM-P-91; 61160-CM-P-91; 61162-CM-P-91; 61163-CM-P-91; 61165-CM-P-91; 61167-CM-P-91 through 61174-CM-P-91; 61177-CM-P-91 through 61180-CM-P-91; 61182-CM-P-91 through 61191-CM-P-91; and 61193-CM-P-91 through 61196-CM-P-91. The July 27, 1993 and August 31, 1993 petitions were filed more than two months after the date of the return letters sent to the applicants, and thus, are untimely. Petitioners claim that they had great difficulty filing the petitions within the required time frame because of the Commission's failure to return the petitions to the designated contact representative. The petitioners argue

44. These 96 applications propose a transmitter site that is within 50 miles or the radio horizon of 55 post-1983, previously proposed MMDS stations, with applications pending on July 30, 1991, the filing date of the Fort Morgan applications.[59] These applications failed to include interference studies, as required by § 21.902(b) and (c), for 49 previously proposed MMDS stations with applications pending. In addition, the interference studies that the applicants did include were inadequate because they failed to submit free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the previously proposed or authorized stations as required by § 21.902(c), (d) and (f). The applicants also failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, the Fort Morgan applicants failed to demonstrate that the station proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

45. The Fort Morgan petitioners primarily assert that the returned applications were acceptable for filing and contained all elements necessary for any waiver.[60] Petitioners maintain that they submitted interference studies and served all known existing or proposed stations within 50 miles, and that if additional stations do exist, petitioners should not be penalized if it is impossible to identify these other filings from the Commission's data base.[61] Petitioners further assert that their interference studies demonstrated no realistic possibility of harmful interference to any other known applications, that they have committed to make every effort to avoid harmful interference to others and to cooperate in good faith should any interference occur in

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that this caused delays in both the receipt of return notifications and the filing of petitions. The only proof offered to substantiate this claim are two letters from applicants in San Diego, Texas.

The Commission staff has taken no action on Application File Nos. 61148-CM-P-91 through 61165-CM-P-91; 61167-CM-P-91 through 61174-CM-P-91; and 61176-CM-P-91 through 61197-CM-P-91. Thus, petitions filed on behalf of these applications will be dismissed as premature.

[59] All 55 of these applications propose to serve Sterling, Colorado (including but not limited to, Application File Nos. 54478-CM-P-91; 53706-CM-P-91; 54908-CM-P-91; 54348-CM-P-91; and 50196-CM-P-90). Application File No. 50196-CM-P-90 was subsequently granted (WMH740).

[60] However, the Fort Morgan applications did not contain a waiver request.

[61] Petitioners also contend that returning their applications for failing to file the required interference studies is disingenuous in light of the fact that the Commission waived the requirements of § 21.902 (c)(2) for applicants at the time of filing, citing *Donald E. Benson.*

the future.[62] The petitioners contend that, because all required interference analyses were supplied and demonstrated no harmful interference would result from granting the applications, the Commission acted arbitrarily and capriciously in returning the applications without a "hard look" and adopted more stringent separation standards *ex post facto*. Petitioners argue that the Commission's decision to return the Fort Morgan applications for non-compliance with the *1988 Public Notice* is misplaced because the *Public Notice* contemplates the granting of waivers of the 50 mile location restriction where the applicant has demonstrated non-interference, as the petitioners claim they have done here.[63] Further, the petitioners assert that the distance between the proposed Fort Morgan site and the previously proposed or authorized stations prohibits service to Fort Morgan, and that there were no reasonable alternative sites from which to provide reliable service on a non-interference basis. Petitioners also assert that a grant of a waiver would effectuate the underlying purpose of the pertinent rules, which petitioners claim is the avoidance of harmful interference.

46. Gunnison, Colorado. On January 9, 1991, certain petitioners filed two applications proposing the same transmitter site at Gunnison, Colorado.[64] After reviewing the Gunnison applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated June 23, 1993. The letters indicated that each application was returned because the applicant: (1) performed an inadequate interference analysis by failing to serve all affected parties with interference studies and/or by failing to consider all previously proposed or authorized MMDS or ITFS stations; and (2) filed in the geographic area of an authorized MMDS station or pending MMDS application. Reconsideration petitions were filed on August 31, 1993 for the two returned applications.[65]

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[62] Petitioners cite *Austin Movie* for the proposition that the Commission may grant applications despite potential interference when an applicant shows that potential interference problems have been resolved, as petitioners claim to have done here.

[63] Petitioners cite *Lawrence N. Brandt* and *Marylan J. Benson* as confirmation of the Commission's policy permitting waiver of the 50 mile location restriction upon a showing of lack of harmful interference to cochannel or adjacent channel stations operating within 50 miles or the radio horizon of a transmitter site.

[64] Application File Nos. 57327-CM-P-91 and 57337-CM-P-91.

[65] These reconsideration petitions were filed more than two months after the date of the return notification letters sent to the applicants and thus, are untimely. While petitioners refer to a petition "filed earlier," no such petition was received by the Commission. Other than asserting that the Commission in "several instances" did not return applications to the contact representative specified in the applications, thereby "creating the possibility of insufficient notice of its actions," petitioners have offered no explanation for their late filing. We note that the return letters were mailed to the

47. These two applications propose a transmitter site that is within 50 miles or the radio horizon of 94 post-1983, previously proposed MMDS stations, with applications pending on January 9, 1991, the filing date of the Gunnison applications.[66] The applicants failed to include interference studies, as required by § 21.902(b) and (c), for these 94 previously proposed MMDS stations and to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, the Gunnison applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to previously proposed stations.

48. The Gunnison petitioners assert that they fully complied with the Commission's rules and waiver requirements.[67] In support, petitioners contend that the required interference analyses demonstrated that no harmful interference would result from granting the applications. Petitioners further contend that no reasonable alternative sites exist which would provide reasonable service to Gunnison, and that the Gunnison applications should be accepted because reliable service to Gunnison would otherwise be denied, given the distance between authorized or previously proposed MMDS stations and Gunnison. Thus, petitioners assert that the Commission acted arbitrarily and capriciously in returning the applications without a "hard look" at the applicants' eligibility for a waiver of the *1988 Public Notice* location restriction, and without a careful review of the applicants' showing.[68]

49. Lamar, Colorado. On June 6, 1991, a petitioner filed an application proposing a transmitter site at Lamar, Colorado.[69] After reviewing the application, the Commission staff returned it as defective and unacceptable for filing by return

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applicants, one of whom was also the contact representative specified in the applications. No petitions were filed for 34 other applications, which proposed the same transmitter site at Gunnison, and were filed and returned on the same date as the petitioned applications.

[66] All 94 applications specified a transmitter site at Montrose, Colorado (including, but not limited to, Application File Nos. 53629-CM-P-90 through 53648-CM-P-90).

[67] The applications, however, did not include a waiver request.

[68] Petitioners also argue that the Commission: (1) failed to identify the previously filed applications for the same geographic area, thereby denying petitioners' *Ashbacker* right to challenge the prior-filed applications; (2) failed to provide sufficient detail of the specific reasons for the return of the applications, contrary to the requirements of reasoned and articulated decision-making; and (3) incorrectly applied the "so called 15/50 mile rules" *vis-a-vis* existing or proposed MMDS operations.

[69] Application File No. 59581-CM-P-91.

notification letter dated June 30, 1992. The letter indicated that the application was returned because the applicant filed in the geographic area of an authorized or pending MMDS station. A reconsideration petition was filed on August 31, 1993.[70]

50. This application proposes a transmitter site that is within 50 miles or the radio horizon of 41 post-1983, previously proposed MMDS stations, with applications pending on June 6, 1991, the filing date of the Lamar application.[71] The applicant failed to include interference studies, as required by § 21.902(b) and (c), for any of the previously proposed MMDS stations and to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, the Lamar applicant failed to demonstrate that the station proposed in the returned application would not cause harmful interference to authorized or previously proposed stations.

51. The Lamar petitioner primarily asserts that the returned application contained all the necessary elements, including the required interference analyses, for the granting of a waiver.[72] The application, however, did not contain a waiver request. Petitioner contends that, because all required interference analyses were supplied, all service and filing requirements met, and proof of no harmful interference resulting from granting the application offered, the Commission acted arbitrarily and capriciously in returning the application without a "hard look" at the applicant's eligibility for a waiver and without a careful review of the applicant's showing.[73] Petitioner argues that other MMDS stations cannot provide reliable service to Lamar, given their distance from the community. Petitioner further asserts that her waiver request fully complied with Commission rules by showing the lack of a reasonable alternative site, and that

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[70] This petition was filed over a year after the date of the return notification letter sent to the applicant and thus, was untimely. While petitioner makes reference to an earlier filed petition, no date or filing number is given and no earlier petition was received by the Commission for the Lamar application. Other than asserting that the Commission in "several instances" did not return applications to the contact representative specified in the applications, thereby "creating the possibility of insufficient notice of its actions," petitioner offered no explanation for her late filing.

[71] These 41 applications also propose to serve Lamar and specify a transmitter site just .16 miles from the site proposed in the returned application. Application File Nos. 53532-CM-P-91 (WMX203) and 53443-CM-P-91 (WMX200) were subsequently granted.

[72] Petitioner failed to attach the engineering statement referenced in the petition, which petitioner claims discusses the "more than adequate steps" taken to avoid interference and the lack of a reasonable alternative transmitter site.

[73] Petitioner cites *Austin Movie* for the proposition that the Commission may grant applications despite potential interference when an applicant shows that the potential interference problems have been resolved, as petitioner claims to have done here.

without grant of the waiver, reliable service to Lamar would be effectively denied.[74]

52. Cross City, Florida. On November 18, 1991, certain petitioners filed 69 applications proposing the same transmitter site at Cross City, Florida. After reviewing each of the 69 Cross City applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated October 20, 1992. The letters indicated that each application was returned because the applicant: (1) selected a transmitter site which makes the proposed station mutually exclusive with an authorized station or previously proposed application; and (2) filed a waiver request that failed to comply with § 21.19 requirements. Seventy-one reconsideration petitions were filed on November 19, 1992 or November 23, 1992 for the 69 returned applications.[75]

53. These 69 applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) 42 1983 proposed MMDS stations, with applications pending on November 18, 1991, the filing date of the Cross City applications;[76] and (2) nine post-1983, previously proposed MMDS stations, with applications pending on November 18, 1991.[77] These 69 Cross City applications failed to include interference studies, as

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[74] Petitioner also complains that the Commission failed to indicate which applications were filed before the Lamar application for the same geographic area and that as a result, petitioner's *Ashbacker* rights to challenge these prior filed applications were denied.

[75] Reconsideration petitions were filed for Application File Nos. 51756-CM-P-92 through 51765-CM-P-92; 51815-CM-P-92 through 51857-CM-P-92; and 51859-CM-P-92 through 51874-CM-P-92. In some instances, the same attorney submitted multiple petitions for the same application. The reconsideration petition for Application File No. 51874-CM-P-92 was filed four days after the expiration of the 30-day period for the filing of such petitions.

No reconsideration petition was filed for Application File No. 51759-CM-P-92, which specified the same transmitter site at Cross City and was filed and returned on the same dates as the petitioned applications.

[76] These applications propose a transmitter site at Gainesville, Florida and include, but are not limited to, Application File Nos. 12725-CM-P-83; 10563-CM-P-83; 15074-CM-P-83; 15285-CM-P-83; 03882-CM-P-83; 07107-CM-P-83; 11354-CM-P-83; 13566-CM-P-83; 16296-CM-P-83; and 08186-CM-P-83. Application File Nos. 15285-CM-P-83 and 15074-CM-P-83 were subsequently granted (WGW515 and WMH620).

[77] Seven of the applications propose a transmitter site at Perry, Florida (Application File Nos. 51860-CM-P-90 through 51685-CM-P-90; and 50207-CM-P-90), and two propose a transmitter site at Live Oak, Florida (Application File Nos. 61262-CM-P-91 and 61263-CM-P-91).

required by § 21.902(b) and (c), for 49 previously proposed MMDS stations with applications pending. The interference studies that were filed were inadequate in that they failed to include the free space calculations of the desired to undesired signal ratio for each reference receiving antenna within the protected service area of authorized or previously proposed stations. These applicants also failed to comply with the requirements of § 21.901(d)(1) for ITFS interference protection because free space calculations were not submitted for each registered receive site of Station WHR976 (Chiefland, Florida), an ITFS station with an authorized transmitter site within 50 miles of the proposed Cross City transmitter site. In addition, the applicants failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, these applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

54. The Cross City petitioners assert that the returned applications contained the necessary elements for granting a waiver of the Commission's 50-mile location restriction, including all required interference analyses. Chiefly, petitioners contend that the required interference analyses were served on the affected parties, filed with the Commission, and demonstrated that no harmful interference would result from grant of the applications.[78] According to petitioners, the distance between the proposed Cross City site, and the other previously proposed or authorized stations, prevents the occurrence of harmful interference. Petitioners further argue that their waiver request fully complied with Commission rules by showing the lack of a reasonable alternative site, and that without grant of the waiver, reliable service to the proposed service area would be effectively denied. In addition, petitioners maintain that the Commission has previously granted an MDS application, notwithstanding possible interference to another facility, when the applicant's engineering analysis and agreement with potentially affected parties overcame the presumption of harmful interference, citing *Austin Movie*. Claiming to have met all service and filing requirements and committed to continued cooperation in the avoidance of harmful interference, petitioners contend that the Commission acted arbitrarily and capriciously by returning the applications without a "hard look." Petitioners accordingly conclude that the Commission's failure to review the applications carefully, results in the adoption of "more stringent separation standards *ex post facto*," and that denial of the waiver request defeats the underlying purpose of the interference analysis and *1988 Public Notice* requirements.

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[78] Petitioners cite the *Lawrence N. Brandt* and *Marylan J. Benson* cases, as confirmation of the Commission's policy permitting waiver of the 50 mile location restriction upon a showing of lack of harmful interference to cochannel or adjacent channel stations operating within 50 miles or the radio horizon of a proposed transmitter site, and to distinguish the instant waiver request from two that were denied for having failed to provide all of the requisite interference analyses.

55. Thomaston, Georgia. On June 4, 1991, a petitioner filed an application proposing a transmitter site at Thomaston, Georgia.[79] After reviewing the Thomaston application, the Commission staff returned it as defective and unacceptable for filing by return notification letter dated March 26, 1992. The letter indicated that the application was returned because: (1) certain answers were incomplete; (2) specific information requested was not provided; and/or (3) the application did not comply substantially with the Commission's rules. A reconsideration petition was filed on August 31, 1993 for the returned application.[80]

56. The returned application proposes a transmitter site that is within 50 miles or the radio horizon of: (1) 51 1983 proposed MMDS stations with applications pending on June 4, 1991, the filing date of the Thomaston application;[81] and (2) one post-1983, previously proposed MMDS station, with an application pending on June 4, 1991.[82] The applicant failed to include interference studies, as required by § 21.902(b) and (c), for one previously proposed MMDS station with an application pending. The interference studies that were submitted were inadequate in that they: (1) failed to include free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the previously proposed or authorized stations, as required by § 21.902(c), (d), and (f); (2) contained incorrect technical parameters such as the transmit antenna gain and the reference receive gain; (3) indicated terrain

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[79] Application File No. 59504-CM-P-91.

[80] This petition was filed more than one year and five months after the date of the return letters sent to the applicants. Other than asserting that the Commission in "several instances" did not return applications to the "contact representative," petitioner has offered no explanation for the late filing. While petitioner refers to unidentified petitions for reconsideration which were "filed earlier," no such earlier petitions were ever filed with the Commission.

Reconsideration petitions were not filed for Applications File Nos. 59502-CM-P-91; 59503-CM-P-91; 59505-CM-P-91 through 59528-CM-P-91; 59530-CM-P-91 through 59544-CM-P-91; 59546-CM-P-91 through 59549-CM-P-91; and 59560-CM-P-91 through 59576-CM-P-91, which proposed the same transmitter site at Thomaston, Georgia, and were filed on the same dates as the petitioned application.

[81] These 51 applications include 37 applications for Macon, Georgia and 14 applications for Columbus, Georgia (including, but not limited to, Application File Nos. 08760-CM-P-83; 10139-CM-P-83; 03442-CM-P-83; 12013-CM-P-83; 15325-CM-P-83; 07149-CM-P-83; 10342-CM-P-83; 02784-CM-P-83; 15116-CM-P-83; 16338-CM-P-83; 07452-CM-P-83; and 13608-CM-P-83). Application File Nos. 11714-CM-P-83 (WMH545) and 06733-CM-P-83 (WMI857) for Macon, Georgia, were subsequently granted.

[82] Application File No. 50787-CM-P-90 (Columbus, Georgia).

blockage, but did not include supporting demonstrations, such as shadow maps or terrain profiles; (4) used incorrect antenna specifications; and (5) failed to engineer the proposed station to provide 45 dB of cochannel interference protection and 0 dB of adjacent channel interference protection pursuant to § 21.902(b)(3) and (4). In addition, the applicant failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, the Thomaston applicant failed to demonstrate that the station proposed in the returned application would not cause harmful interference to authorized or previously proposed stations.

57. Petitioner argues that the Commission: (1) insufficiently detailed its reasons for returning the application; (2) failed to indicate which previously filed applications, if any, established any valid cut-off period, thereby violating the applicant's *Ashbacker* rights; (3) failed to properly enunciate and/or premise its rules, policies, and reasons for return, citing *McElroy Electronics*; and (4) incorrectly applied the "so-called 15/50 mile rules" relating to existing or proposed MMDS stations. Petitioner also claims that its application fully complied with the Commission's rules and waiver requirements. In support, petitioner maintains that the interference analysis filed with the application demonstrated that there is no realistic possibility of harmful interference to any other existing or proposed station and that the Commission has previously granted MMDS applications despite potential interference when an applicant shows such potential interference problems have been resolved. Petitioner further asserts that the potentially affected parties have raised no objections. Thus, petitioner contends that denial of its waiver request by return notification letter does not meet the "hard look" requirement established in *WAIT Radio* and defeats the underlying purpose of the Commission's interference study requirements.[83]

58. Kellogg, Idaho. On February 7, 1992, certain petitioners filed 70 applications proposing the same transmitter site at Kellogg, Idaho. After reviewing each of these 70 Kellogg applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated May 12, 1993. The letters indicated that the applications were returned because the applicants: (1) filed past the cut-off period established in §§ 21.31 or 21.914; (2) filed inadequate interference analyses due to applicants' failure to serve all affected parties pursuant to § 21.902(g) and/or failure to consider all previously proposed or authorized ITFS or MMDS stations pursuant to § 21.902(c) and/or 21.902(i); and (3) failed to meet the criteria established in the *1988 Public Notice*, in that the applications were filed in an area of an authorized MMDS station or a pending MMDS application and which was not open for filing pursuant to § 21.901(d)(4). Reconsideration petitions were filed for the 70 returned

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[83] Despite petitioner's claim that a copy of the application and an engineering statement were attached to the petition, neither was filed with the petition.

MMDS applications on August 31, 1993.[84]

59. These 70 applications propose a transmitter site that is within 50 miles or the radio horizon of two 1983 authorized MMDS stations[85] and two post-1983 previously proposed MMDS stations with applications pending on February 7, 1992, the filing date of the Kellogg applications.[86] These Kellogg applications failed to include interference studies, as required by § 21.902(b) and (c), for two authorized MMDS stations and two previously proposed stations. In addition, the applicants failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, these 70 applications failed to demonstrate that the station proposed in the returned applications would not cause harmful interference to authorized stations.

60. On reconsideration, the Kellogg petitioners argue that the Commission: (1) insufficiently detailed its reasons for returning the applications; (2) violated the applicants' *Ashbacker* rights by failing to indicate which of the previously filed applications, if any, established any valid cut-off period; (3) failed to properly enunciate and/or premise its rules, policies, and reasons for returning the applications; and (4) incorrectly applied the location restriction relating to existing or proposed MMDS stations. Petitioners also claim that the applications contained all necessary waiver requests and that their interference analyses demonstrated that there is no realistic possibility of harmful interference to any other existing or proposed station. They further argue that the Commission has previously granted MMDS applications despite potential interference when an applicant shows such potential interference problems

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[84] Petitions were filed for Application File Nos. 01351-CM-P-92 through 01360-CM-P-92; 01405-CM-P-92 through 01417-CM-P-92; 01457-CM-P-92 through 01461-CM-P-92; 01467-CM-P-92; 01468-CM-P-92; 01509-CM-P-92 through 01518-CM-P-92; 01523-CM-P-92 through 01529-CM-P-92; 01565-CM-P-92 through 01567-CM-P-92; 01608-CM-P-92 through 01617-CM-P-92; 01619-CM-P-92 through 01625-CM-P-92; and 01627-CM-P-92 through 01629-CM-P-92. These petitions were filed more than three months after the date of the return notification letters sent to the applicants and thus, are untimely. While petitioners refer to an earlier filed petition, none was ever received by the Commission. Petitioners also claim that because some return letters were returned to the applicants and not the "contact representatives," and because some return letters in some markets allegedly had other applications or no applications attached, the Commission has "created the possibility of insufficient notice of its actions" and is therefore required to reinstate these applications under *McElroy Electronics.*

[85] WHT783 and WHT784 in Spokane, Washington.

[86] Application file Nos. 52343-CM-P-92 and 52344-CM-P-92, which both were subsequently granted (WMI349 and WMI353). The transmitter sites for these two stations are located just 0.21 miles from the transmitter site proposed in the returned Kellogg applications.

have been resolved, citing *Austin Movie*. Petitioners finally contend that the Commission did not give their waiver requests the "hard look" required by *WAIT Radio*, and that denying their waiver request defeats the underlying purpose of interference study requirements.

61. Rochester, Indiana. On November 29, 1991, certain petitioners filed two MMDS applications proposing the same transmitter site at Rochester, Indiana.[87] After reviewing each of the Rochester applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated October 26, 1992. The letters indicated that each application was returned because the applicant filed in the geographic area of other pending MMDS applications. The letters also indicated that the applicants' waiver requests were denied due to failure to comply with § 21.19 requirements. Reconsideration petitions were filed on November 25, 1992 for the two returned applications.

62. These two applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) 72 1983 proposed MMDS stations, with applications pending on November 29, 1991, the filing date of the Rochester applications;[88] and (2) one post-1983, previously proposed MMDS station, with an application pending on November 29, 1991.[89] The Rochester applicants failed to include interference studies, as required by § 21.902(b) and (c), for three previously proposed MMDS stations with applications pending. Moreover, the interference studies submitted with the applications were inadequate in that they failed to submit free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the previously proposed or authorized stations as required by § 21.902(c), (d) and (f). *See* § 21.902(e). These applicants also failed to comply with the requirements of § 21.901(d)(1) for ITFS interference protection because free space calculations were not submitted for each registered receive site of four ITFS licensees with an authorized

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[87] Application File Nos. 52021-CM-P-92 and 52022-CM-P-92.

[88] These proposed stations included five applications for Kokomo, Indiana, 12 applications for Elkhart, Indiana, and 55 applications for South Bend, Indiana (including, but not limited to, Application File Nos. 13133-CM-P-83; 00733-CM-P-83; 01661-CM-P-83; 02192-CM-P-83; and 02120-CM-P-83). The following applications were subsequently granted: Application File Nos. 06721-CM-P-83 and 05837-CM-P-82 (WMI853 and WMI307 in South Bend, Indiana); 06667-CM-P-83 and 01610-CM-P-83 (WMI877 and WMH997 in Kokomo, Indiana); and 11659-CM-P-83 (WMH360 in Elkhart, Indiana).

[89] Application File No. 50105-CM-P-92 (WLW772 in Elkhart, Indiana) was subsequently authorized.

transmitter site within 50 miles of the proposed Rochester transmitter site.[90] In addition, the applicants failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, the Rochester applicants failed to demonstrate that the station proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

63. The Rochester petitioners primarily assert that the returned applications contained all the necessary elements, including the required interference analyses, for the granting of a waiver of the *1988 Public Notice* location restrictions.[91] Petitioners contend that, because all required interference analyses were supplied, all service requirements met, and proof of no harmful interference resulting from granting the applications offered, the Commission acted arbitrarily and capriciously in returning the applications without a hard look at the applicants' eligibility for a waiver and without a careful review of the applicants' showing.[92] Petitioners accordingly conclude that the Commission's failure to review the applications carefully results in the adoption of "more stringent separation standards *ex post facto*," and that denial of the waiver request defeats the underlying purpose of the interference analysis and the *1988 Public Notice* requirements. Petitioners further argue that the distance between Rochester and the other previously proposed or authorized stations hinders the ability of these stations to provide reliable service to the Rochester community, that no reasonable alternative site exists from which to provide service to Rochester, and that without grant of the waiver, reliable service to Rochester would be effectively denied.

64. Lamoni, Iowa. On December 19, 1991, certain petitioners filed 57 applications proposing the same transmitter site at Lamoni, Iowa.[93] After reviewing 28 of these applications, the Commission staff returned them as defective and unacceptable for filing by return notification letters dated June 23, 1993. The letters indicated that each of the 28 applications was returned because the applicant: (1) filed in the geographic area of authorized or pending MMDS applications; and (2) filed inadequate

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[90] Stations WHR944 (Rochester, Indiana), WHR489 (South Bend, Indiana), WHB846 (Kokomo, Indiana) and WHR491 (Westville, Indiana).

[91] Petitioners cite *Austin Movie* for the proposition that the Commission may grant applications despite potential interference when an applicant shows that the potential interference problems have been resolved.

[92] Petitioners also cite the *Lawrence N. Brandt* and *Marylan J. Benson* cases in support of their request for a waiver of the 50 mile benchmark.

[93] Application File Nos. 52349-CM-P-92; 52354-CM-P-92; 52356-CM-P-92; 52359-CM-P-92 through 52361-CM-P-92; 52364-CM-P-92 through 52370-CM-P-92; 52372-CM-P-92; 52374-CM-P-92; 52376-CM-P-92; 52378-CM-P-92 through 52383-CM-P-92; 52385-CM-P-92; 52386-CM-P-92; and 52388-CM-P-92 through 52391-CM-P-92.

interference analyses due to applicants' failure to serve all affected parties pursuant to § 21.902(g) and/or to consider all previously proposed or authorized ITFS or MMDS stations pursuant to § 21.902(c) and/or 21.902(i). Fifty-seven petitions for reconsideration were filed on July 23, 1993 for the 28 returned applications and for 29 applications that had not been returned.[94]

65. The 28 returned MMDS applications propose a transmitter site that is within 50 miles or the radio horizon of three post-1983 proposed MMDS stations with applications pending on December 19, 1991, the filing date of the Lamoni applications.[95] The returned applications failed to include interference studies, as required by § 21.902(b) and (c), for two of the previously proposed MMDS stations. The study that was submitted was inadequate in that it failed to include free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the previously proposed or authorized stations as required by § 21.902(c), (d), and (f). *See* § 21.902(e). These applicants also failed to comply with the requirements of § 21.901(d)(1) for ITFS interference protection because free space calculations were not submitted for each registered receive site of Station WHR868 (Creston, Iowa), an ITFS station with an authorized transmitter site within 50 miles of the proposed Lamoni transmitter site. In addition, the applicants failed to satisfy the requirements for service of interference studies as stipulated by § 21.902(g). Thus, the Lamoni applicants failed to demonstrate that the stations proposed would not cause harmful interference to the authorized or previously proposed stations.

66. The Lamoni petitioners argue that the Commission: (1) insufficiently detailed its reasons for returning the applications; (2) violated the applicants' *Ashbacker*

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[94] Petitions were filed for the 28 returned applications (including multiple petitions for Application File No. 52369-CM-P-92), and for 29 pending applications (Application File Nos. 52392-CM-P-92 through 52395-CM-P-92; 52397-CM-P-92 through 52400-CM-P-92; 52402-CM-P-92; 52403-CM-P-92; 52405-CM-P-92; 52407-CM-P-92 through 52411-CM-P-92; 52413-CM-P-92 through 52423-CM-P-92; 52428-CM-P-92; and 52430-CM-P-92). The petitions for reconsideration filed for the pending applications are hereby dismissed as premature.

Reconsideration petitions were not filed for Application File Nos. 52350-CM-P-92 through 52353-CM-P-92; 52355-CM-P-92; 52357-CM-P-92; 52358-CM-P-92; 52362-CM-P-92; 52363-CM-P-92; 52371-CM-P-92; 52373-CM-P-92; 52375-CM-P-92; 52377-CM-P-92; 52384-CM-P-92; 52387-CM-P-92; 52396-CM-P-92; 52401-CM-P-92; 52404-CM-P-92; 52406-CM-P-92; 52412-CM-P-92; 52424-CM-P-92 through 52427-CM-P-92; 52429-CM-P-92; 52431-CM-P-92; and 52432-CM-P-92, which also proposed the same transmitter site at Lamoni and were filed on the same day as the petitioned applications.

[95] Application File Nos. 50062-CM-P-91; 55999-CM-P-91; and 55864-CM-P-91 (Trenton, Missouri.) Application File No. 50062 (WMH885) was subsequently granted.

rights, by failing to indicate which applications, if any, established any valid cut-off period; (3) failed to properly enunciate and/or premise its rules, policies, and reasons for return, citing *McElroy Electronics*; and (4) incorrectly applied the "so-called 15/50 mile" rule relating to existing or proposed MMDS stations. Petitioners also claim that the Lamoni applications fully complied with the Commission's rules and waiver requirements. However, no waiver requests were included in the applications. Petitioners maintain that their interference analysis demonstrated that there is no realistic possibility of harmful interference to any other existing or proposed station and that the Commission has previously granted MMDS applications despite potential interference when an applicant shows such potential interference problems have been resolved, citing *Austin Movie*. Petitioners further contend that denial of their waiver requests by return notification letter does not meet the "hard look" requirement established in *WAIT Radio* and defeats the underlying purpose of interference study requirements.

67. Liberal, Kansas. On March 24, 1992, certain petitioners filed 31 applications proposing the same transmitter site at Liberal, Kansas.[96] After reviewing each of the Liberal applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated June 23, 1993. The letters indicated that each application was returned because the applicant filed in the geographic area of an authorized or pending MMDS stations. The letters also stated that the applicant filed inadequate interference analyses pursuant to § 21.902 due to failure to serve all affected parties pursuant to § 21.902(g), and/or failure to consider all previously proposed or authorized ITFS or MMDS stations pursuant to § 21.902(c) and/or § 21.902(i). Reconsideration petitions were filed on August 31, 1993 for the 31 returned applications.[97]

68. These 31 applications propose a transmitter site that is within 50 miles or the radio horizon of three post-1983, previously proposed MMDS stations, with

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[96] Application File Nos. 03443-CM-P-92; 03439-CM-P-92 through 03453-CM-P-92; 03459-CM-P-92; 03460-CM-P-92; 03476-CM-P-92; 03477-CM-P-92; and 03479-CM-P-92 though 3489-CM-P-92.

[97] These petitions were filed more than two months after the date of the return letters sent to the applicants and thus, were untimely. While petitioners refer to an earlier filed petition, the Commission did not receive any other petitions for the Liberal applications. Petitioners also claim that they had great difficulty filing the petitions within the required time frame because of the Commission's failure to return the applications to the designated contact representative. Petitioners argue that this caused delays in both the receipt of return notifications by the contact representative and the filing of petitions. No proof is offered by petitioners to support this position.

applications pending on March 24, 1992, the filing date of the Liberal applications.[98] These applications failed to submit free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the previously proposed stations, as required by § 21.902(c), (d) and (f). *See* § 21.902(e). The Liberal applicants also failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, the Liberal applicants failed to demonstrate that the station proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

69. The Liberal petitioners primarily assert that the returned applications contained all the necessary elements, including the required interference analyses, for the granting of a waiver. Petitioners contend that because the required interference analyses were supplied and demonstrated that no harmful interference would result from the proposed station, the Commission acted arbitrarily and capriciously in returning the applications without a "hard look" at the applicants' eligibility for a waiver and without a careful review of the applicants' showing.[99] Petitioners further argue that: (1) other MMDS stations cannot provide reliable service to Liberal, given their distance from the community;[100] (2) the Commission failed to indicate which applications were filed before the Liberal applications for the same geographic area, thereby denying petitioners' *Ashbacker* right to challenge these prior filed applications; and (3) the Commission failed to provide sufficient detail of the specific reasons for the return of the applications, contrary to the requirements of reasoned and articulated decision-making.

70. Maysville, Kentucky. On December 19, 1991, certain petitioners filed 84 applications proposing the same transmitter site at Maysville, Kentucky. After reviewing each of the Maysville applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated June 23, 1993 or June 30, 1993. The letters indicated that each application was returned because the applicant: (1) filed in the geographic area of an authorized MMDS station or pending MMDS application; and (2) submitted an inadequate

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[98] Application File Nos. 55508-CM-P-91; 55501-CM-P-91; and 02177-CM-P-92 (Guymon, Oklahoma).

[99] Petitioners cite *Austin Movie* for the proposition that the Commission may grant applications despite potential interference when an applicant shows that the potential interference problems have been resolved.

[100] Petitioners further allege that their proposed site was carefully chosen to render the best practical service to Liberal, and that no reasonable alternative sites exist which "would provide reliable service. . . on a non-interference basis. . ." Petitioners, however, fail to provide the promised engineering study which, they claim, confirms the lack of an alternative site.

interference analysis due to failure to consider all previously proposed or authorized ITFS or MMDS stations and/or failure to serve all affected parties. Reconsideration petitions were filed on July 23, 1993 for these 84 returned applications.[101]

71. These 84 applications propose a transmitter site that is within 50 miles or the radio horizon of four post-1983, previously proposed MMDS stations, with applications pending on December 19, 1991, the filing date of the Maysville applications.[102] These 84 Maysville applications failed to include interference studies, as required by § 21.902(b) and (c), for two previously proposed MMDS stations with applications pending. In addition, the interference studies submitted with the applications were inadequate in that they failed to include free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the previously

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[101] The Maysville applicants jointly filed two petitions, one seeking reconsideration for 41 returned applications for the E channel group (Application File Nos. 52436-CM-P-92 through 52442-CM-P-92; 52444-CM-P-92 through 52446-CM-P-92; 52448-CM-P-92 through 52453-CM-P-92; 52457-CM-P-92 through 52461-CM-P-92; 52463-CM-P-92 through 52465-CM-P-92; 52467-CM-P-92 through 52469-CM-P-92; 52472-CM-P-92 through 52476-CM-P-92; 52478-CM-P-92; 52479-CM-P-92; 52481-CM-P-92; 52483-CM-P-92; 52484-CM-P-92; and 52486-CM-P-92 through 52489-CM-P-92), and the other seeking reconsideration for 43 returned applications for the F channel group (Application File Nos. 52347-CM-P-92; 52348-CM-P-92; 52433-CM-P-92; 52493-CM-P-92 through 52498-CM-P-92; 52500-CM-P-92 through 52502-CM-P-92; 52504-CM-P-92 through 52509-CM-P-92; 52511-CM-P-92 through 52514-CM-P-92; 52516-CM-P-92 through 52518-CM-P-92; 52520-CM-P-92 through 52522-CM-P-92; 52525-CM-P-92 through 52529-CM-P-92; 52531-CM-P-92 through 52534-CM-P-92; 52536-CM-P-92; 52537-CM-P-92; and 52539-CM-P-92 through 52542-CM-P-92). While it appeared from the pleading captions that the petitions requested reconsideration on behalf of some 120 applicants, a closer examination revealed that many applicants' names and file numbers were simply listed twice in the caption. In fact, 27 additional applications for the same transmitter site at Maysville, which were filed and returned on the same dates as these 84 petitioning Maysville applications, were not included in the joint petitions for reconsideration (Application File Nos. 52490-CM-P-92 through 52492-CM-P-92; 52499-CM-P-92; 52503-CM-P-92; 52510-CM-P-92; 52515-CM-P-92; 52519-CM-P-92; 52523-CM-P-92; 52524-CM-P-92; 52530-CM-P-92; 52535-CM-P-92; 52538-CM-P-92; 52434-CM-P-92; 52435-CM-P-92; 52443-CM-P-92; 52447-CM-P-92; 52455-CM-P-92; 52456-CM-P-92; 52462-CM-P-92; 52466-CM-P-92; 52470-CM-P-92; 52471-CM-P-92; 52477-CM-P-92; 52480-CM-P-92; 52482-CM-P-92; and 52485-CM-P-92).

[102] Application File Nos. 55558-CM-P-91; 55519-CM-P-91; 51354-CM-P-92; and 51355-CM-P-92. Application File Nos. 51354-CM-P-92 and 51355-CM-P-92 (Cherry Forks, Ohio) propose a transmitter site just 20.20 miles from the site proposed by the Maysville applications, and were placed on public notice on July 8, 1992.

proposed stations as required by § 21.902(c), (d) and (f). *See* § 21.902(e). Furthermore, the applicants failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, these 84 applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

72. On reconsideration, the Maysville petitioners assert their applications fully complied with the Commission's rules and waiver requirements and argue that the Commission failed to give their waiver requests a "hard look." None of the 84 Maysville applications, however, contained a waiver request.[103] Additionally, the Maysville petitions attempt to incorporate by reference arguments made in an "above-referenced Petition for Reconsideration filed earlier." No filing date or application file number is supplied for this "above-referenced" petition and no earlier petition was ever received for any Maysville application. Thus, we have considered only those arguments made in the reconsideration petitions before us.

73. Leesville, Louisiana. On June 24, 1991, certain petitioners filed 52 applications proposing the same transmitter site at Leesville, Louisiana. After reviewing each of the Leesville applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated March 17, 1993. The letters indicated that each application was returned because the applicant: (1) filed past the cut-off period established in §§ 21.31 or 21.914; and (2) filed in the geographic area of an authorized MMDS station or pending MMDS application. Reconsideration petitions were filed on August 3, 1993 or August 31, 1993 for the 52 returned applications.[104]

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[103] Petitioners also contend that the Commission: (1) violated their *Ashbacker* rights by denying them the opportunity to challenge any prior-filed applications; (2) failed to enunciate or give sufficient detail of the reasons for the return of the applications; (3) incorrectly applied the location restrictions in the *1988 Public Notice;* and (4) would effectively deny reliable service to Maysville if the dismissal of the petitioned applications is allowed to stand.

[104] The petition filed on August 3, 1993 seeks reconsideration on behalf of 34 applicants (Application File Nos. 60186-CM-P-91; 60255-CM-P-91; 60149-CM-P-91; 60227-CM-P-91; 60136-CM-P-91; 60216-CM-P-91; 60169-CM-P-91; 60232-CM-P-91; 60190-CM-P-91; 60178-CM-P-91; 60187-CM-P-91; 60243-CM-P-91; 60139-CM-P-91; 60226-CM-P-91; 60138-CM-P-91; 60228-CM-P-91; 60199-CM-P-91; 60203-CM-P-91; 60183-CM-P-91; 60204-CM-P-91; 60201-CM-P-91; 60176-CM-P-91; 60184-CM-P-91; 60244-CM-P-91; 60157-CM-P-91; 60248-CM-P-91; 60143-CM-P-91; 60218-CM-P-91; 60151-CM-P-91; 60177-CM-P-91; 60152-CM-P-91; 60215-CM-P-91; 60153-CM-P-91; and 60229-CM-P-91). The August 31, 1993 petition seeks reconsideration on behalf of 18 applicants (Application File Nos. 60173-CM-P-91; 60233-CM-P-91; 60141-CM-P-91;

74. These 52 applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) one 1983 proposed MMDS station, with an application pending on June 24, 1991, the filing date of the Leesville applications;[105] and (2) 111 post-1983, previously proposed MMDS stations, with applications pending on June 24, 1991.[106] The Leesville applicants failed to submit interference studies, as required by § 21.902(b) and (c), for all 112 previously proposed MMDS stations with applications pending and to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, the Leesville applicants failed to demonstrate that the station proposed in the returned applications would not cause harmful interference to previously proposed stations.

75. The Leesville petitioners assert that the Commission failed: (1) to provide sufficient detail of the specific reasons for the return of their applications; (2) to indicate which applications, if any, established any valid cut-off period, thereby denying the applicants' *Ashbacker* rights to challenge the previously filed applications; (3) to properly enunciate and/or premise its rules, policies and reasons for return, citing *McElroy Electronics*; and (4) to correctly apply its location restrictions. Petitioners

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60237-CM-P-91; 60168-CM-P-91; 60223-CM-P-91; 60193-CM-P-91; 60130-CM-P-91; 60253-CM-P-91; 60241-CM-P-91; 60142-CM-P-91; 60217-CM-P-91; 60148-CM-P; 60245-CM-P-91; 60185-CM-P-91; 60242-CM-P-91; 60189-CM-P-91; and 60254-CM-P-91). The August petitions were filed some five months after the date of the return letters sent to the applicants and thus, are untimely. While petitioners refer to an "earlier filed" petition, no earlier petition was received by the Commission. Petitioners also (1) complain that MMDS applicants in some markets have experienced delays in receiving return notification letters, attaching letters from two San Diego, Texas applicants alleging that the correct applications were not attached to the return notification letters these San Diego applicants received in a timely fashion, and (2) imply that the Leesville filing was somehow delayed because the Commission did not mail a copy of each return letter to the contact representative listed in the applications, thereby creating the possibility of insufficient notice, citing *McElroy Communications.*

Reconsideration petitions were not filed for 80 other applications specifying the same transmitter site at Leesville, which were filed and returned on the same dates as the petitioned applications.

[105] Application File No. 09286-CM-P-83.

[106] The post-1983, previously proposed stations include 109 applications for Natchitoches, Louisiana (including, but not limited to, Application File Nos. 54230-CM-P-91; 54118-CM-P-91; and 54192-CM-P-91) and two applications (Application File Nos. 59760-CM-P-91 and 59761-CM-P-91) specifying a transmitter site in Leesville just 1.66 miles from the site proposed in the petitioned applications. Application File Nos. 54192-CM-P-91 and 54635-CM-P-91 (Natchitoches) have been chosen as tentative lottery selectees.

further assert that they complied with Commission rules and waiver requirements.[107] Moreover, according to petitioners, there was no realistic possibility of harmful interference to any other proposed or existing stations due to the distance between the proposed site and other stations.[108] Petitioners also maintain that because of the distance of other stations from Leesville, these stations cannot provide reliable service to Leesville, and that the Leesville proposed site was carefully chosen to provide the most practical service to the proposed area. Petitioners conclude that the Commission acted arbitrarily and capriciously by returning the applications without a "hard look," and that denial of a waiver would preclude reliable service to Leesville and defeat the underlying purpose of the Commission's rules and *1988 Public Notice* requirements.

76. Ruston, Louisiana. On July 1, 1991, certain petitioners filed 130 applications proposing the same transmitter site at Ruston, Louisiana. After reviewing each of the Ruston applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated June 30, 1992. The letters indicated that each application was returned because the applicant filed in the geographic area of an authorized MMDS station or pending MMDS application. Reconsideration petitions were filed on July 23, 1993 or August 31, 1993 for the 130 returned applications.[109]

77. These 130 applications propose a transmitter site that is within 50 miles or

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[107] The applications, however, did not contain a waiver request.

[108] Petitioners note that the Commission has previously granted MMDS applications, notwithstanding possible interference to the signals within the protected service area of another facility, when the applicant's engineering analysis and agreement with potentially affected parties overcame the presumption of harmful interference, citing *Austin Movie.*

[109] Reconsideration petitions were filed for Application File Nos. 60273-CM-P-91 through 60308-CM-P-91; 60310-CM-P-91 through 60362-CM-P-91; 60393-CM-P-91 through 60403-CM-P-91; and 60405-CM-P-91 through 60434-CM-P-91. Petitions were not filed for Application File Nos. 60404-CM-P-91 and 60309-CM-P-91, which specified the same transmitter site at Ruston, and were filed and returned on the same date as the petitioned applications. We also note that one applicant violated the one-to-a-market rule, 47 C.F.R. § 21.901(d)(2), because the applicant filed two applications for F group stations at Ruston (Application File Nos. 60309-CM-P-91 and 60310-CM-P-91).

The Ruston reconsideration petitions were filed more than a year after the date of the return notification letters and thus, are untimely. Petitioners argue that their untimely petitions should be accepted because the Commission's failure to return the applications to the designated contact representative caused delays in filing the petitions. However, no representation is made that any of the Ruston applicants failed to receive return letters in a timely manner.

the radio horizon of: (1) one 1983 authorized MMDS station;[110] (2) 14 1983 proposed MMDS stations, with applications pending on July 1, 1991, the filing date of the Ruston applications;[111] and (3) 52 post-1983, previously proposed MMDS stations, with applications pending on July 1, 1991.[112] The applicants failed to include interference studies, as required by § 21.902(b) and (c), for 66 previously proposed MMDS stations. In addition, the interference studies that were submitted with the applications were inadequate in that they failed to include free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the previously proposed or authorized stations, as required by § 21.902(c), (d) and (f). *See* § 21.902(e). The applicants also failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, the Ruston applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

78. The Ruston petitioners assert that the returned applications fully complied with the Commission's rules and waiver requirements. Specifically, petitioners contend that, because the required interference analyses were supplied and showed that no harmful interference would result from granting the applications, the Commission acted arbitrarily and capriciously in returning the applications without taking a "hard look" at the applicants' eligibility for a waiver of the *1988 Public Notice* location restriction, and without a careful review of the applicants' showing.[113]

79. Athens, Maine. On February 18, 1992, certain petitioners filed 90 applications proposing the same transmitter site at Athens, Maine. After reviewing each of the 90 Athens applications, the Commission staff returned each application as

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[110] Station WMH357 at Monroe, Louisiana.

[111] Application File Nos. 15529-CM-P-83; 16531-CM-P-83; 07161-CM-P-83; 04579-CM-P-83; 11726-CM-P-83; 15337-CM-P-83; 13620-CM-P-83; 02235-CM-P-83; 08034-CM-P-83; 15741-CM-P-83; 05023-CM-P-83; 06920-CM-P-83; 10634-CM-P-83; and 13997-CM-P-83.

[112] These 52 applications included one application for Monroe, Louisiana (Application File No. 58969-CM-P-91) and 51 applications for Natchitoches, Louisiana (including, but not limited to, Application File Nos. 55963-CM-P-91; 55934-CM-P-91; 55920-CM-P-91; and 55969-CM-P-91).

[113] In addition, petitioners assert that the Commission failed: (1) to indicate which other applications were filed before the Ruston applications for the same geographic area, thereby denying the applicants' *Ashbacker* rights to challenge these prior-filed applications; (2) to provide sufficient detail of the specific reasons for the return of the applications, contrary to the requirements of reasoned and articulated decision-making; and (3) to correctly apply the 50 mile location restriction.

defective and unacceptable for filing by return notification letters dated March 10, 1993. The letters indicated that each application was returned because the applicant: (1) filed in the geographic area of an authorized MMDS station or pending MMDS application; (2) filed past the relevant cut-off period; and (3) filed inadequate interference analyses due to failure to serve all affected parties with copies of interference studies and failure to consider all previously proposed or authorized MMDS or ITFS stations pursuant to § 21.902(c) and/or 21.902(i). Reconsideration petitions were filed on August 10, 1993 for the 90 Athens applications.[114]

80. These 90 applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) one 1983 authorized MMDS station;[115] (2) four 1983 proposed MMDS stations, with applications pending on February 18, 1992, the filing date of the Athens applications;[116] and (3) two post-1983, previously proposed MMDS stations with

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[114] The Athens applicants jointly filed two petitions, one seeking reconsideration of 45 returned applications for Channel Group E (Application File Nos. 01849-CM-P-92 through 01858-CM-P-92; 01883-CM-P-92 through 01885-CM-P-92; 01887-CM-P-92; 01895-CM-P-92 through 01899-CM-P-92; 01900-CM-P-92 through 01903-CM-P-92; 01917-CM-P-92; 01918-CM-P-92; 01982-CM-P-92 through 01987-CM-P-92; 01998-CM-P-92 through 02007-CM-P-92; and 02065-CM-P-92 through 02068-CM-P-92), and the other seeking reconsideration of 45 returned applications for Channel Group F (Application File Nos. 01870-CM-P-92 through 01882-CM-P-92; 01906-CM-P-92 through 01908-CM-P-92; 02037-CM-P-92; 02038-CM-P-92; 02061-CM-P-92 through 02063-CM-P-92; 02069-CM-P-92 through 02072-CM-P-92; 02087-CM-P-92 through 02099-CM-P-92; 02102-CM-P-92; and 02124-CM-P-92 through 02129-CM-P-92).

These reconsideration petitions were filed five months after the date of the return notification letters sent to the Athens applicants and thus, are untimely. Although petitioners refer to an unidentified petition for reconsideration "filed earlier," and incorporate the arguments contained therein in the August 10, 1993 petitions, no earlier petition was received for any of the Athens applicants. Petitioners maintain that the Commission bypassed the contact representative in returning the applications, thereby causing delays in the receipt of the return notification letters, and resulting in late-filed petitions. Petitioners also complain that some applicants experienced delays in receiving returned applications and the return notification letters. As evidence of Commission's inconsistent approach to returning applications, petitioners attach letters from two San Diego, Texas applicants which indicate that the return notification letters for San Diego, Texas were received in a timely fashion, but claim that the notification letters were returned without the correct, corresponding application.

[115] Station WMH221 at Augusta, Maine has since been forfeited.

[116] Two of these 1983 MMDS applications propose a transmitter site at Bangor, Maine (Application File Nos. 13070-CM-P-83 and 05384-CM-P-83), and the other two propose a transmitter site at Augusta, Maine (Application File Nos. 06155-CM-P-83 and

applications pending on February 18, 1992.[117] These 90 Athens applications failed to include interference studies, as required by § 21.902(b) and (c), for six previously proposed MMDS stations with applications pending. In addition, the interference study submitted with the applications failed to include free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the authorized or previously proposed stations as required by § 21.902(c), (d) and (f). *See* § 21.902(e). The applicants also failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g).[118] Thus, the 90 Athens applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

81. The Athens petitioners assert that their applications were in full compliance with the Commission's rules and waiver requirements, particularly §§ 21.901, 21.902, 21.19, 21.20-21, and 21.31, and that their interference showing was adequate because: (1) the distance between the proposed Athens site and the other stations' sites eliminates any realistic possibility of harmful interference; (2) the distance of other MMDS stations from Athens prohibits service to Athens on a reliable basis; (3) the proposed site was carefully chosen to provide the most practical service to the specifically proposed service area; and (4) there exist no reasonable alternative sites which would provide reliable service to Athens. Petitioners, citing *Austin Movie*, further maintain that the Commission has previously granted an MDS application, notwithstanding possible interference to the signals within the protected service area of another facility, when the applicant's engineering analysis and agreement with potentially affected parties overcame the presumption of harmful interference. Contending that the Commission acted arbitrarily and capriciously by returning the applications without a "hard look," petitioners claim that denial of the requested waiver would defeat the underlying purpose of the *1988 Public Notice* requirements, and effectively deny reliable service to Athens.[119]

01699-CM-P-83). Application No. 13070-CM-P-83 (WMI882) was granted and forfeited subsequent to the filing of the Athens applications. Application No. 06155-CM-P-83 (WMI878) was also granted subsequent to the filing of the Athens applications.

[117] The two applications propose a transmitter site at Bingham, Maine (Application File Nos. 52331-CM-P-92 and 52332-CM-P-92).

[118] The certificate of service signed by the engineer who prepared Exhibit E to the Athens applications certifies that only two authorized ITFS stations and one MMDS station were served.

[119] Petitioners also list four additional grounds for reconsideration: (1) the Commission's insufficient detailing of the specific reasons for return of the applications; (2) the Commission's failure to indicate which applications, if any, established any valid cut-off period, thereby violating the applicants' *Ashbacker* rights; (3) the Commission's

82. Big Rapids, Michigan. On July 31, 1991, certain petitioners filed four applications proposing the same transmitter site at Big Rapids, Michigan. After reviewing these applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated March 10, 1993. The letters indicated that each application was returned because the applicant: (1) filed past the relevant cut-off period established in §§ 21.31 or 21.914; and (2) filed in the geographic area of an authorized or pending MMDS station. Reconsideration petitions were filed on August 31, 1993 for the four returned applications.[120]

83. These four applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) 25 1983 previously proposed MMDS stations with applications pending on July 31, 1991, the filing date of the Big Rapids applications;[121] and (2) one post-1983 previously proposed MMDS station, with an application pending on July 31, 1991.[122] These four Big Rapids applications failed to include interference studies, as required by § 21.902(b) and (c), for 24 previously proposed MMDS stations with applications pending. The interference studies that were submitted were inadequate in that they: (1) failed to include free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the previously proposed stations as required by § 21.902(c), (d) and (f); (2) indicated terrain

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failure to properly enunciate and/or premise its rules, policies, and reasons for return, contrary to *McElroy Electronics*; and (4) the Commission's incorrect application of the *1988 Public Notice* location restrictions and other criteria for filing applications.

[120] A joint reconsideration petition was filed for Application File Nos. 61224-CM-P-91; 61231-CM-P-91; 61235-CM-P-91; and 61238-CM-P-91. This petition was filed more than five months after the return notification letters sent to the applicants, and thus, was untimely. While petitioners refer to an unidentified petition for reconsideration "filed earlier," no earlier petition was received by the Commission. Petitioners also complain that the Commission bypassed the contact representative, thereby "creating the possibility of insufficient notice of its actions," citing *McElroy Electronics*, and that some unidentified MMDS applicants experienced delays in receiving the return notification letters or their applications.

[121] These applications propose a transmitter site at Muskegon, Michigan (Application File Nos. 13999-CM-P-83; 08777-CM-P-83; 10638-CM-P-83; 09470-CM-P-83; 15339-CM-P-83; 15743-CM-P-83; 02798-CM-P-83; 12027-CM-P-83; 04581-CM-P-83; 11728-CM-P-83; 07466-CM-P-83; 13622-CM-P-83; 10357-CM-P-83; 07163-CM-P-83; 16352-CM-P-83; 01453-CM-P-83; 08353-CM-P-83; 15130-CM-P-83; 09120-CM-P-83; 02239-CM-P-83; 16665-CM-P-83; 14291-CM-P-83; 08575-CM-P-83; 13791-CM-P-83; and 09977-CM-P-83.) Application File Nos. 07163-CM-P-83 and 16352-CM-P-83 were subsequently authorized (WMH509 and WMH389).

[122] Application File No. 50186-CM-P-90 (Cadillac, Michigan).

blockage, but did not include supporting demonstrations, such as shadow maps or terrain profiles; (3) used incorrect methodology to calculate the protected service area of previously proposed stations; (4) used incorrect antenna specifications; and (5) contained incorrect technical parameters for the previously proposed and newly proposed stations, such as the transmitting antenna gain and the reference receiving antenna gain. The applicants also failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, these Big Rapids applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to previously proposed stations.

84. Petitioners assert that their applications were in full compliance with the Commission's rules and waiver requirements, particularly §§ 21.901, 21.902, 21.19, 21.20-21, and 21.31, and that their interference showing for the proposed Big Rapids site was adequate because: (1) the distance between the proposed Big Rapids site and the other stations' sites eliminates any realistic possibility of harmful interference; (2) the distance of other MMDS stations from Big Rapids prohibits service to Big Rapids on a reliable basis; (3) the proposed site was carefully chosen to provide the most practical service to the specifically proposed service area; and (4) there exist no reasonable alternative sites which would provide reliable service to Big Rapids.[123] Petitioners, citing *Austin Movie*, further maintain that the Commission has previously granted MDS applications, notwithstanding possible interference to the signals within the protected service area of another facility, when the applicant's engineering analysis and agreement with potentially affected parties overcame the presumption of harmful interference. Contending that the Commission acted arbitrarily and capriciously by returning the applications without a "hard look," the petitioners claim that denial of the requested waiver would defeat the underlying purpose of the rules, and effectively deny reliable service to Big Rapids.[124]

85. Newberry, Michigan. On February 21, 1992, one petitioner filed an application proposing a transmitter site at Newberry, Michigan.[125] After reviewing the

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[123] Petitioners neglected to attach the "further Engineering Statement" referenced in the petition, which promised to discuss the "more than adequate steps" taken to avoid interference and the lack of a reasonable alternative transmitter site.

[124] Petitioners also list four additional grounds for reconsideration: (1) the Commission's insufficient detailing of the specific reasons for the return of the applications; (2) the Commission's failure to indicate which applications, if any, established any valid cut-off period, thereby violating the applicants' *Ashbacker* rights; (3) the Commission's failure to properly enunciate and/or premise its rules, policies, and reasons for return; and (4) the Commission's incorrect application of the *1988 Public Notice* location restrictions and other filing criteria.

[125] Application File No. 04234-CM-P-92.

Newberry application, the Commission staff returned it as defective and unacceptable for filing by return notification letter dated March 10, 1993. The letter indicated that the application was returned because the applicant: (1) filed past the relevant cut-off period as established in § 21.31 or § 21.914; and (2) filed in the geographic area of an authorized MMDS station or pending MMDS application. A reconsideration petition was filed on August 31, 1993 for this returned application.[126]

86. This application proposes a transmitter site that is within 50 miles or the radio horizon of: (1) three 1983 authorized MMDS stations;[127] (2) one 1983 proposed MMDS station, with an application pending on February 21, 1992, the filing date of the Newberry applications;[128] and (3) 103 post-1983, previously proposed MMDS stations, with applications pending on February 21, 1992.[129] This application failed to include interference studies, as required by § 21.902(b) and (c), for three authorized MMDS stations and 103 previously proposed MMDS stations with applications pending. In addition, the applicant failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, this Newberry applicant failed to demonstrate that the station proposed in the returned application would not cause harmful interference to authorized or previously proposed stations.

87. The Newberry petitioner asserts that the application fully complied with the Commission's rules and waiver requirements.[130] Specifically, petitioner contends that, because the required interference analyses were supplied and showed that no harmful interference would result from granting the application, the Commission acted arbitrarily and capriciously in returning the application without taking a "hard look" at the applicant's eligibility for a waiver of the *1988 Public Notice* location restriction, and

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[126] This petition was filed more than five months after the date of the return letter sent to the applicant and thus, was untimely. No petitions were filed for 27 other applications, which proposed the same transmitter site at Newberry and which were filed and returned on the same day as the petitioned application. Petitioner argues that the petition should be accepted because the Commission's failure to return the application to the designated contact representative caused delay in filing the petition.

[127] Stations WLC270 (Marquette, Michigan), WMH305 (St. Germain, Wisconsin) and WMH304 (Egg Harbor, Wisconsin).

[128] Application File No. 01921-CM-P-83 was subsequently granted (WMI279, Escanaba, Michigan).

[129] These proposed stations include, but are not limited to, Application File Nos. 01207-CM-P-92; 01206-CM-P-92; 50438-CM-P-92; and 50432-CM-P-92.

[130] The application, however, did not include a waiver request.

without a careful review of the applicant's showing.[131] Petitioner also argues that the Commission failed to: (1) indicate which other applications were filed before the Newberry application for the same geographic area, thereby denying petitioner's *Ashbacker* rights to challenge these prior-filed applications; (2) provide sufficient detail of the specific reasons for the return of the application, contrary to the requirements of reasoned and articulated decision-making, citing *McElroy Electronics*; and (3) correctly apply the "so called 15/50 mile rules" *vis-a-vis* existing or proposed MMDS operations. Petitioner also maintains the Newberry application should be accepted because reliable service from an MMDS station to Newberry would otherwise be effectively denied, given the distance of authorized or previously proposed MMDS stations to Newberry and the lack of reasonable alternative sites which could provide reliable service on a non-interference basis.

88. Spring Grove, Michigan. On April 8, 1992, certain petitioners filed 131 applications proposing the same transmitter site at Spring Grove, Michigan. After reviewing each of the Spring Grove applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated March 17, 1993. The letters indicated that each application was returned because the applicant: (1) filed past the relevant cut-off date, in that the applicant selected an incorrect transmitter site which makes the proposed station mutually exclusive with an authorized station or previously proposed application; (2) filed in an area not open for filing, in that the applicant filed in the geographic area of an authorized MMDS station or pending MMDS application, and thereby did not meet the criteria established in the *1988 Public Notice*; and (3) failed to meet the requirements in § 21.19 for the granting of a waiver, and without a waiver, the application failed to comply with the Commission's rules, and thus was unacceptable for filing. One hundred forty-nine reconsideration petitions were filed on April 16, 1993, July 28, 1993, or August 31, 1993 for these 131 returned applications.[132]

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[131] In support, petitioner notes that the Commission has granted MMDS applications despite potential interference when an applicant shows such potential interference problems have been resolved, citing *Austin Movie.*

[132] Petitions were filed for Application File Nos. 03947-CM-P-92 through 03952-CM-P-92; 03960-CM-P-92 through 03964-CM-P-92; 03968-CM-P-92 through 03976-CM-P-92; 03981-CM-P-92 through 03983-CM-P-92; 04026-CM-P-92 through 04037-CM-P-92; 04047-CM-P-92 through 04068-CM-P-92; 04072-CM-P-92 through 04073-CM-P-92; 04083-CM-P-92 through 04090-CM-P-92; 04092-CM-P-92; 04108-CM-P-92 through 04117-CM-P-92; 04126-CM-P-92 through 04128-CM-P-92; 04135-CM-P-92 through 04183-CM-P-92; and 04190-CM-P-92. A petition was also filed for the Peterson Partnership. Commission records, however, indicate that this entity only applied for E and F channel stations in Cassville, Missouri. No petition was filed for Application File No. 04091-CM-P-92, which proposed the same transmitter site at Spring Grove, and was

89. The returned applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) one 1983 authorized MMDS stations;[133] (2) 74 1983 previously proposed MMDS stations, whose applications were pending on April 8, 1992;[134] and (3) 80 post-1983, previously proposed MMDS stations, whose applications were pending on April 8, 1992.[135] These Spring Grove applications failed to include interference studies, as required by § 21.902(b) and (c), for 150 previously proposed MMDS stations, whose applications were pending on April 8, 1992. In addition, the interference studies submitted with the applications were inadequate in that they failed to include free space calculations of the desired to undesired signal ratio for each reference receiving antenna within the protected service areas of the authorized or previously proposed stations as required by § 21.902(c), (d) and (f). *See* § 21.902(e). The applicants also

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filed and returned on the same dates as the petitioned applications.

Individual reconsideration petitions were timely filed on April 16, 1993 for 48 of the Spring Grove applications (Application File Nos. 03949-CM-P-92; 03952-CM-P-92; 03960-CM-P-92; 03962-CM-P-92 through 03963-CM-P-92; 03971-CM-P-92; 03975-CM-P-92; 03981-CM-P-92 through 03983-CM-P-92; 04029-CM-P-92; 04033-CM-P-92; 04034-CM-P-92 through 04037-CM-P-92; 04048-CM-P-92; 04055-CM-P-92 through 04056-CM-P-92; 04064-CM-P-92 through 04065-CM-P-92; 04067-CM-P-92 through 04068-CM-P-92; 04073-CM-P-92; 04087-CM-P-92; 04110-CM-P-92; 04117-CM-P-92; 04136-CM-P-92 through 04137-CM-P-92; 04139-CM-P-92; 04142-CM-P-92; 04152-CM-P-92; 04154-CM-P-92; 04156-CM-P-92 through 04157-CM-P-92; 04159-CM-P-92; 04163-CM-P-92 through 04164-CM-P-92; 04166-CM-P-92; 04169-CM-P-92 through 04170-CM-P-92; 04174-CM-P-92 through 04179-CM-P-92; and 04181-CM-P-92). The remainder of the Spring Grove reconsideration petitions are untimely. The untimely petitioners contend that the Commission failed in several instances to return applications to the contact representative, and this caused delays in the contact representative's receipt of the return notification letters, which in turn led to delays in filing the petitions. Similarly, they assert that at least a few applicants received incorrect applications or no applications as enclosures; while they attach two letters to support their assertion, these letters are from San Diego, Texas applicants and make no reference to the difficulties supposedly experienced by some Spring Grove applicants.

[133] WMI861 in Benton Harbor, Michigan.

[134] Including, but not limited to, Application File Nos. 01546-CM-P-83; 00178-CM-P-83; 10321-CM-P-83; 01607-CM-P-83; 09569-CM-P-83; 16242-CM-P-83; 05208-CM-P-83; 06394-CM-P-83; 08667-CM-P-83; and 08575-CM-P-83. Application File Nos. 06394-CM-P-83 (WMI829 in Benton Harbor, Michigan); 09569-CM-P-83 (WLK260 in Battle Creek, Michigan); 01607-CM-P-83 and 10321-CM-P-83 (WMH593 and WMH652 in Kalamazoo, Michigan) were subsequently granted.

[135] Application File Nos. 50027-CM-P-90; 50199-CM-P-90; 50129-CM-P-90; 50045-CM-P-90; and 50221-CM-P-90 through 50296-CM-P-90.

failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, the Spring Grove applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to any authorized or previously proposed station.

90. On reconsideration, the Spring Grove petitioners argue that: (1) their applications could not have been cut-off under § 21.31, because no other application to serve the Spring Grove area was first placed on public notice by the Commission; (2) Section 21.914 is the appropriate cut-off rule; and (3) the Commission did not indicate which applications, if any, established any valid cut-off period, thereby denying their right to challenge the acceptability of the alleged previously-filed application(s).[136] Petitioners maintain that interference analyses, and not the fixed distance separation standards set by the *1988 Public Notice*, are the mechanism for applicants to demonstrate non-interference, and that the Commission expressed this preference in its *Report and Order* in PR Docket 92-80 (FCC 93-31, released February 12, 1993). Petitioners further assert that they performed and served adequate interference analyses for all reasonably known existing or proposed MMDS and ITFS stations within 50 miles, that these analyses demonstrate that the proposed station would not cause harmful interference, and that precautions would be taken to avoid future interference and eliminate any which might occur. Moreover, petitioners claim that potentially affected parties raised no objections to the proposed Spring Grove transmitter site.

91. Finally, petitioners contend that their applications sufficiently justified a waiver because there is "no realistic possibility" of harmful interference, a waiver would serve the public interest because the other stations identified in the engineering analyses could not reliably serve Spring Grove, and there were no reasonable alternative sites to serve Spring Grove other than the one selected. Petitioners also argue that granting the waiver would effectuate the underlying purpose of the rules, which they claim is to avoid harmful interference. Petitioners further contend that in issuing a form letter to deny the waiver requests and return the applications, the Commission's action: (1) was arbitrary and capricious, and contrary to the principles of reasoned decision-making; (2) abandoned the Commission's duty to give each waiver request a "hard look," as required by *WAIT Radio*; and (3) constituted summary denial of the applications without careful review.

92. Vicksburg, Mississippi. On September 23, 1991, certain petitioners filed 123 applications proposing the same transmitter site at Vicksburg, Mississippi. After reviewing each of the Vicksburg applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated September

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[136] All of the post-1983 MMDS applications that were pending on the filing date of the Spring Grove applications were placed on public notice on August 23, 1991, over seven months prior to the filing of petitioners' applications.

14, 1992. The letters indicated that the applicant filed in the geographic area of a pending MMDS application, and thereby did not meet the criteria established in the *1988 Public Notice*. The letter also indicated that the application failed to meet the requirements in § 21.19 for the granting of a waiver, and that without a waiver, the application failed to comply with the Commission's rules, and thus, was unacceptable for filing. One hundred thirty-nine reconsideration petitions were filed on October 14, 1992 or August 31, 1993 for these 123 returned applications.[137]

93. The Vicksburg applications specified a transmitter site within the Jackson, Mississippi MSA and its buffer zone, and thus, were mutually exclusive with and cut-off by authorized and previously proposed stations within the MSA, pursuant to § 21.901(d)(5). The proposed transmitter site is also within 50 miles or the radio horizon of: (1) one 1983 authorized MMDS station;[138] (2) 37 1983 previously proposed MMDS stations, with applications pending on September 23, 1991, the filing date of the Vicksburg applications;[139] and (3) one post-1983 authorized MMDS station.[140] These Vicksburg applications failed to include interference studies, as required by § 21.902(b) and (c), for 36 previously proposed MMDS stations, with applications pending. In addition, the interference studies submitted with the applications were inadequate in that they failed to include free space calculations of the desired to undesired signal ratio for each reference receiving antenna within the protected service areas of the authorized or proposed stations as required by § 21.902(c), (d) and (f). *See* § 21.902(e). The appli-

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[137] Petitions were filed for Application File Nos. 62129-CM-P-91 through 62195-CM-P-91; 62200-CM-P-91; 62204-CM-P-91 through 62223-CM-P-91; 62225-CM-P-91 through 62230-CM-P-91; and 62232-CM-P-91 through 62260-CM-P-91. No petitions were filed for Application File Nos. 62196-CM-P-91 through 62199-CM-P-91; 62201-CM-P-91 through 62203-CM-P-91; and 62224-CM-P-91, which specified the same transmitter site in Vicksburg and were returned on the same day as the petitioned applications. On August 31, 1993, a second petition was filed on behalf of 16 of the October 1992 petitioners and on behalf of five additional applicants (Application File Nos. 62215-CM-P-91 through 62218-CM-P-91 and 62176-CM-P-91). The untimely petitioners contend that the Commission failed in several instances to return applications to the contact representative, which led to delays in filing the petitions, assert that some unidentified applicants received incorrect applications or no applications with their return notification letters.

[138] WMH413 in Rayville, Louisiana.

[139] These 37 applications for Jackson, Mississippi, include, but are not limited to, Application File Nos. 01770-CM-P-83; 04248-CM-P-83; 04351-CM-P-83; 12268-CM-P-83; 12443-CM-P-83; 12611-CM-P-83; and 14156-CM-P-83. Application File No. 15302-CM-P-83 (WLK203) was subsequently granted.

[140] WLW835 in Jackson, Mississippi.

cants also failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, the Vicksburg applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to any authorized or previously proposed station.

94. On reconsideration, the Vicksburg petitioners assert that they performed and served adequate interference analyses for all existing or proposed MMDS stations within 50 miles, that these analyses demonstrate that the proposed station would not cause harmful interference, and that potentially affected parties raised no objections to the proposed Vicksburg transmitter site. Petitioners further contend that their applications contained all necessary elements for grant of a waiver of the *1988 Public Notice*'s 50 mile location restriction because there is "no realistic possibility" of harmful interference, and that granting a waiver would effectuate the underlying purpose of the location restriction, which is avoid harmful interference, and serve the public interest because the other MMDS stations identified in the engineering analyses could not reliably serve Vicksburg. Thus, petitioners' conclude that, by merely checking three boxes on a form letter to deny the waiver requests and return the applications, the Commission was arbitrary and capricious and abandoned it's duty to give each waiver request a "hard look," as required by *WAIT Radio.* [141]

95. Waynesboro, Mississippi. On February 28, 1992, certain petitioners filed 65 applications proposing the same transmitter site at Waynesboro, Mississippi. After reviewing each of the Waynesboro applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated March 17, 1993. The letters indicated that each application was returned because the applicant: (1) filed past the cut-off period established in §§ 21.31 or 21.914; and (2) filed in the geographic area of an authorized MMDS station or pending MMDS application. The letters also indicated that the applicant's waiver request did not comply with § 21.19 requirements, and that without a waiver, the applications were unacceptable for filing. Sixty-six reconsideration petitions were filed for these 65 returned applications on

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[141] The untimely Vicksburg petitioners also seek to incorporate by reference the following arguments made by the timely Vicksburg petitioners: (1) the Commission did not indicate which particular applications, if any, established any valid cut-off period, thus denying the applicants' their *Ashbacker* rights to challenge the acceptability of the previously filed application(s); (2) the Commission failed to properly enunciate and/or premise its rules and policies and reasons for return of the applications, and such failure is contrary to the principles of reasoned and articulated decision-making; and (3) the Commission incorrectly applied the "so-called 50 mile rule" *vis-a-vis* existing or proposed MMDS stations. The untimely petitioners also make reference to an attached "Engineering Statement" and maintain that it "confirms" that there were no reasonable alternative sites to serve Vicksburg other than the one selected. No such statement was attached, and no such showing was made in the applications.

April 16, 1992, August 3, 1993 and August 31, 1993.[142]

96. These returned applications proposed a transmitter site that is within 50 miles or the radio horizon of: (1) one 1983 authorized MMDS station;[143] and (2) 98 post-1983, previously proposed MMDS stations, with applications pending on February 28, 1992, the filing date of the Waynesboro applications.[144] The Waynesboro applications

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[142] Nearly identical, individual reconsideration petitions were filed on April 16, 1992 for Application File Nos. 02230-CM-P-92; 02231-CM-P-92; 02235-CM-P-92; 02237-CM-P-92 through 02239-CM-P-92; 02243-CM-P-92; 02244-CM-P-92; 02248-CM-P-92; 02252-CM-P-92; 02255-CM-P-92; 02257-CM-P-92; 02259-CM-P-92; 02288-CM-P-92; 02293-CM-P-92; 02297-CM-P-92; 02309-CM-P-92; 02318-CM-P-92; 02322-CM-P-92; 02343-CM-P-92; 02380-CM-P-92 and 02381-CM-P-92. A duplicate reconsideration petition was filed for Application File No. 02243-CM-P-92. On August 3, 1993, a joint reconsideration petition was filed for Application File Nos. 02228-CM-P-92; 02233-CM-P-92; 02234-CM-P-92; 02241-CM-P-92; 02242-CM-P-92; 02245-CM-P-92; 02246-CM-P-92; 02254-CM-P-92; 02256-CM-P-92; 02273-CM-P-92; 02274-CM-P-92; 02276-CM-P-92; 02278-CM-P-92; 02279-CM-P-92; 02280-CM-P-92; 02282-CM-P-92; 02285-CM-P-92; 02304-CM-P-92; 02333-CM-P-92; 02340-CM-P-92; 02341-CM-P-92; 02346-CM-P-92; 02363-CM-P-92; 02377-CM-P-92; 02379-CM-P-92; 02382-CM-P-92; 02383-CM-P-92; and 02384-CM-P-92. On August 31, 1993, a joint reconsideration petition was filed for Application File Nos. 02232-CM-P-92; 02236-CM-P-92; 02249-CM-P-92; 02281-CM-P-92; 02283-CM-P-92; 02290-CM-P-92; 02295-CM-P-92; 02296-CM-P-92; 02298-CM-P-92; 02303-CM-P-92; 02305-CM-P-92; 02345-CM-P-92; 02348-CM-P-92; 02359-CM-P-92; and 02376-CM-P-92. No reconsideration petitions were filed for Application File Nos. 02229-CM-P-92; 02240-CM-P-92; 02247-CM-P-92; 02250-CM-P-92; 02251-CM-P-92; 02253-CM-P-92; 02258-CM-P-92; 02358-CM-P-92; and 02365-CM-P-92, which proposed the same transmitter site at Waynesboro, Mississippi and were filed and returned on the same date as the petitioned applications.

The August reconsideration petitions were filed five months after the date of the return letters sent to the applicants and thus, are untimely. Petitioners complain that they experienced delays in receiving return notification letters which, they contend, should have been sent to the contact representative specified in the application, and that when the contact representative became aware of the applications' return, all reasonable steps were taken to file a petition. However, petitioners offer no proof that the applicants experienced any delay in receiving the return notification letters relating to the Waynesboro applications.

[143] Station WMH324 at Laurel, Mississippi.

[144] These pending applications include one application for Jackson, Alabama (Application File No. 57038-CM-P-91), 79 applications for Meridian, Mississippi (including, but not limited to, Application File No. 54628-CM-P-91 and 53835-CM-P-91), and 18 applications for Hattiesburg, Mississippi (including, but not limited to,

failed to include interference studies, as required by § 21.902(b) and (c), for 95 previously proposed MMDS stations. In addition, the interference studies submitted with the applications were inadequate in that they failed to include free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the authorized or proposed stations as required by § 21.902(c), (d) and (f). *See* § 21.902(e). The applicants also failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, these Waynesboro applications failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

97. The Waynesboro petitioners assert that the applications fully complied with the Commission's rules and waiver requirements. Petitioners argue that the Commission staff erred in returning the applications as having been filed past the cut-off date because the applicants and their consulting engineer know of no earlier filed application to serve Waynesboro and the return letters fail to identify any previously filed applications. Thus, until the Commission specifically identifies these applications and allows a reasonable period for review and comment, petitioners claim that their *Ashbacker* rights to comment on prior filed applications have been denied. Petitioners further state that their applications contained adequate justification, pursuant to § 21.19, for waiver of the fifty mile location restriction contained in the *1988 Public Notice*, which established that waivers would be granted if applicants demonstrated non-interference. Petitioners contend that because all required interference analyses were supplied and showed that no harmful interference would result from granting the applications, the Commission acted arbitrarily and capriciously in returning the applications without a "hard look" at the applicants' eligibility for a waiver and without a careful review of the applicants' showings. They further argue that any previously proposed MMDS stations cannot reliably serve Waynesboro, given their distance from Waynesboro, and that no reasonable alternative sites exist.

98. Cape Girardeau, Missouri. On May 23, 1991, certain petitioners filed 129 applications proposing the same transmitter site at Cape Girardeau, Missouri. After reviewing each of the Cape Girardeau applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated May 1, May 4, June 30, September 11, or September 15, 1992. The letters indicated that each application was returned because the applicant filed in the geographic area of other pending MMDS applications. In addition, the return letters indicated that some of the applications were returned because the applicant failed to file a duplicate copy of the application in violation of § 21.6(d) or the application failed to satisfy the § 21.19 requirements for the granting of a waiver. One hundred seventy-eight reconsideration petitions were filed on October 13, 1992, August 6, 1993, and August 31, 1993 for the

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Application File No. 53988-CM-P-91 through 53992-CM-P-91).

129 returned applications.[145]

99. These 129 applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) seven 1983 proposed MMDS stations, with applications pending on May 23, 1991, the filing date of the Cape Girardeau applications;[146] (2) one

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[145] Reconsideration petitions were filed for Application File Nos. 59257-CM-P-91 through 59311-CM-P-91; 59313-CM-P-91 through 59329-CM-P-91; 59439-CM-P-91 through 59489-CM-P-91; and 59491-CM-P-91 through 59496-CM-P-91. In a number of instances, the same attorney submitted multiple petitions for the same application. No petitions were filed for two Cape Girardeau applications (Application File Nos. 59312-CM-P-91 and 59490-CM-P-91), which were filed on the same day as the petitioned applications and which specified the same transmitter site. We also note that one applicant violated § 21.901(d)(2) of the rules, because the applicant filed two applications for both E group stations (Application File Nos. 59457-CM-P-91 and 59263-CM-P-91) and for F group stations (Application File Nos. 59486-CM-P-91 and 59483-CM-P-91).

The Cape Girardeau reconsideration petitions filed on October 13, 1992, in response to return notification letters dated September 11 or September 15, 1992, were timely (Application File Nos. 59295-CM-P-91 through 59311-CM-P-91; 59313-CM-P-91 through 59329-CM-P-91; 59439-CM-P-91 through 59489-CM-P-91; and 59491-CM-P-91 through 59496-CM-P-91). However, those petitions filed on October 13, 1992 in response to return letters dated May 1, May 4, or June 30, 1992 are untimely. (Application File Nos. 59257-CM-P-91 and 59259-CM-P-91 through 59294-CM-P-91). On August 6 and August 31, 1993, additional untimely reconsideration petitions were filed; with only one apparent exception (Application File No. 59258-CM-P-91), these additional untimely petitions were filed on behalf of applicants for whom petitions had previously been filed on October 13, 1992. (With regard to Application File No. 59258-CM-P-91, the untimely August 6, 1993 petition was apparently the only one filed.)

Some untimely petitioners claim that their petitions should be regarded as timely filed because the return notification letters were not discovered until a later date. Other petitioners argue that the Commission's failure to return the applications to the designated contact representative caused delays in filing the petitions. No representation is made in the petitions that any of the Cape Girardeau applicants failed to receive return notifications in a timely manner. Also attached to the Cape Girardeau applications are two statements from MMDS applicants proposing to serve the San Diego, Texas area, which state that the Commission did not return their applications with the return notifications. These statements make no reference to reconsideration petitions filed for Cape Girardeau.

[146] Application File Nos. 16646-CM-P-83; 804-CM-P-83; 3503-CM-P-83; 3501-CM-P-83; 3504-CM-P-83; 3681-CM-P-83; and 14578-CM-P-83.

post-1983 authorized MMDS station;[147] and (3) 44 post-1983, previously proposed MMDS stations, with applications pending on May 23, 1991.[148] These applications failed to include interference studies, as required by § 21.902(b) and (c), for one authorized MMDS station and 50 previously proposed MMDS stations with applications pending. In addition, the interference study actually submitted with the applications was inadequate in that it failed to submit free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the previously proposed or authorized stations, as required by § 21.902(c), (d) and (f). *See* § 21.902(e). The applicants also failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, the Cape Girardeau applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

100. The Cape Girardeau petitioners primarily assert that the returned applications contained all necessary elements, including the required interference analyses, for the granting of a waiver of the *1988 Public Notice* location restriction.[149] Petitioners contend that, because all required interference analyses were supplied and showed that no harmful interference would result from granting the applications, the Commission acted arbitrarily and capriciously in returning the applications without a "hard look" at the applicants' eligibility for a waiver and without a careful review of the applicants' showing. Accordingly, the Commission's reliance on the *1988 Public Notice* to return the Cape Girardeau applications was misplaced, petitioners argue, as the *1988 Public Notice* established a mechanism for applicants to demonstrate non-interference. Petitioners also note that Cape Girardeau would be effectively denied reliable service from an MMDS station if the returned applications are not reinstated, because of the distance from Cape Girardeau to authorized or previously proposed MMDS stations. In response to one defect specifically cited in the return notification letters, the petitioners additionally assert that the Commission should consider the Cape Girardeau applications on their merits and should not reject the applications due to the

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[147] Station WMH440 (Sikeston, Missouri).

[148] These 44 applications included one application for Sikeston, Missouri (Application File No. 57296-CM-P-91), and 43 applications for Carbondale, Illinois (including, but not limited to, Application File Nos. 54784-CM-P-90 through 54791-CM-P-90).

[149] We note that, although not all of the Cape Girardeau reconsideration petitions had returned applications attached to them, those returned applications which were attached to petitions did not request a waiver.

failure to file the required duplicate copy.[150]

101. Cassville, Missouri. On April 8, 1992, certain petitioners filed 116 applications proposing the same transmitter site at Cassville, Missouri. After reviewing each of the Cassville applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated March 17, 1993. The letters indicated that each application was returned because the applicant: (1) filed past the cut-off period established in §§ 21.31 or 21.914; (2) filed in the geographic area of an authorized MMDS station or pending MMDS application; and (3) failed to consider all previously proposed or authorized ITFS or MMDS stations pursuant to § 21.902(c) and/or § 21.902(i) and failed to serve all affected parties pursuant to § 21.902(g).[151] In addition, the return letters indicated that the applications failed to meet the requirements in § 21.19 for grant of a waiver, and that without a waiver, the applications failed to comply with the Commission's rules and thus, were unacceptable for filing. One hundred seventeen reconsideration petitions were filed on April 16, 1993, August 10, 1993, and August 31, 1993 for the 116 returned applications.[152]

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[150] The untimely petitioners also assert that the Commission failed to: (1) indicate which other applications were filed before the Cape Girardeau applications for the same geographic area and that the applicants' *Ashbacker* rights were denied because they have been unable to challenge these prior-filed applications; (2) provide sufficient detail of the specific reasons for the return of the applications and that its failure to enunciate the reasons for return is contrary to the requirements of reasoned and articulated decision-making; and (3) correctly apply the 50 mile rule *vis-a-vis* existing or proposed MMDS operations.

[151] The return letters also indicate that the applicants violated the Commission's *MMDS Allocation Order*, which means that the applicants selected a transmitter site within an MSA or its buffer zone. Although the Commission staff was incorrect in listing violation of the *MMDS Allocation Order* as a return reason, it was harmless error nonetheless as the Cassville applications were deficient and unacceptable for filing for other reasons discussed *supra* and *infra*.

[152] Reconsideration petitions were filed for Application File Nos. 03944-CM-P-92 through 03946-CM-P-92; 03953-CM-P-92 through 03959-CM-P-92; 03965-CM-P-92 through 03967-CM-P-92; 03978-CM-P-92 through 03980-CM-P-92; 03984-CM-P-92 through 03988-CM-P-92; 03990-CM-P-92 through 03997-CM-P-92; 03999-CM-P-92; 04000-CM-P-92; 04002-CM-P-92; 04003-CM-P-92; 04005-CM-P-92 through 04013-CM-P-92; 04015-CM-P-92; 04016-CM-P-92; 04038-CM-P-92 through 04046-CM-P-92; 04069-CM-P-92 through 04071-CM-P-92; 04074-CM-P-92 through 04082-CM-P-92; 04093-CM-P-92 through 04103-CM-P-92; 04105-CM-P-92 through 04107-CM-P-92; 04118-CM-P-92 through 04123-CM-P-92; 04125-CM-P-92; 04129-CM-P-92 through 04134-CM-P-92; 04184-CM-P-92; 04185-CM-P-92; 04188-CM-P-92; 04191-CM-P-92 through 04197-CM-P-92; 04200-CM-P-92 through 04209-CM-P-92; and 04211-CM-P-92 through 04214-CM-

102. These 116 applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) two 1983 authorized MMDS stations;[153] (2) 22 1983 proposed MMDS stations,[154] with applications pending on April 8, 1992, the filing date of the Cassville applications; and (3) 29 post-1983, previously proposed MMDS stations,[155] with applications pending on April 8, 1992. These 116 applications failed to include interference studies, as required by § 21.902(b) and (c), for 48 previously proposed MMDS stations with applications pending. In addition, the interference studies that were submitted were inadequate in that they failed to submit free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service areas of the authorized or previously proposed stations as required by § 21.902(c), (d) and (f). *See* § 21.902(e). In addition, the applicants failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, the Cassville applicants failed to demonstrate that the station proposed in the returned

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P-92.

A timely petition for reconsideration was filed for Application File No. 04016-CM-P-92 on April 16, 1993. A petition for reconsideration was filed for Application File Nos. 03965-CM-P-92; 04009-CM-P-92; 04100-CM-P-92; and 04005-CM-P-92 on August 31, 1993. A second reconsideration petition was filed August 10, 1993 for Application File No. 04016-CM-P-92 and for the other 111 applicants. The August 10, 1993, and August 31, 1993 petitions were untimely as they were not filed during the thirty day period provided by § 405 of the Communications Act of 1934 for the filing of such petitions.

Reconsideration petitions were not filed for Application File Nos. 04186-CM-P-92; 04018-CM-P-92; 04124-CM-P-92; 04104-CM-P-92; 04014-CM-P-92; 03977-CM-P-92; 04004-CM-P-92; 04199-CM-P-92; 04198-CM-P-92; 04001-CM-P-92; 03998-CM-P-92; 04187-CM-P-92; 04017-CM-P-92; 04210-CM-P-92; 04189-CM-P-92; and 03989-CM-P-92, which also proposed the same transmitter site at Cassville, Missouri and were filed and returned on the same day as the petitioned applications.

[153] WMH341 in Joplin, Missouri and WMI881 in Fayetteville, Arkansas.

[154] The 1983 previously proposed stations include but are not limited to Application File Nos. 04957-CM-P-83; 10842-CM-P-83; 01580-CM-P-83; 15473-CM-P-83; 10810-CM-P-83; 01743-CM-P-83; 06199-CM-P-83; 06868-CM-P-83; 08710-CM-P-83; 06435-CM-P-83; 13185-CM-P-83; 04385-CM-P-83; 07624-CM-P-83; 03964-CM-P-83; and 01155-CM-P-83. Application File Nos. 6435-CM-P-83 and 1155-CM-P-83 were subsequently granted (WMI821 in Fayetteville, Arkansas and WMI324 in Springfield, Missouri, respectively).

[155] The post-1983 proposed stations pending at the time of the Cassville petitions include but are not limited to, Application File Nos. 55497-CM-P-91; 55584-CM-P-91; 55546-CM-P-91; 55551-CM-P-91; 55496-CM-P-91; 55517-CM-P-91; 55576-CM-P-91; and 55524-CM-P-91.

applications would not cause harmful interference to authorized or previously proposed stations.

103. The April 16, 1993 petitioner asserts that the Commission failed to provide sufficient detail of the specific reasons for the return of the application and that the Commission failed to indicate which other applications were filed before the returned application.[156] The petitioner maintains that the waiver request contained adequate justification for a waiver of the 50-mile location restrictions contained in the *1988 Public Notice* and that the Commission was required to grant the waiver.[157] The petitioner asserts that all required interference analyses were supplied and demonstrated no harmful interference would result from granting the application and that authorized or previously proposed stations would not be able to reliably serve Cassville, because of their distance from Cassville. Petitioner contends that the Commission acted arbitrarily and capriciously by returning the applications without a "hard look." The petitioner concludes that the Commission's failure to review the application carefully results in the adoption of more stringent separation standards or criteria *ex post facto*, and is procedurally unfair.[158]

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[156] Petitioner maintains that his *Ashbacker* rights were denied because he has been unable to challenge these prior filed applications. The petitioner also complains that he inquired as to which application(s) were mutually exclusive with his, and received an oral response by a Commission staff member stating no knowledge as to the reasons for the return. All but two of the 51 pending applications not considered by the petitioner had public notice dates of April 25, 1986, September 26, 1986, or September 27, 1986, more than five years prior to receipt of the petitioner's application.

[157] The petition cites *Austin Movie* for the proposition that the Commission may grant applications despite potential interference when an applicant shows that potential interference problems have been resolved. The petition also cites *Lawrence N. Brandt* and *Marylan J. Benson* as confirmation of the Commission's policy permitting waiver of the 50 mile location restrictions upon a showing of lack of harmful interference to cochannel or adjacent channel stations operating within 50 miles or the radio horizon of a transmitter site, and to distinguish the instant waiver request from two that were denied for having failed to provide all of the requisite interference analyses.

[158] The untimely August 10, 1993, and August 31, 1993, petitions also list the following arguments: (1) insufficient detailing by the Commission of the specific reasons for the returns; (2) no indication of which particular applications, if any, established any valid cut-off period, thereby denying applicants' *Ashbacker* rights; (3) Commission failure to properly enunciate and/or premise its rules, policies and reasons for return; and (4) incorrect application by the Commission of the 50-mile rule. The petitioners also maintain that there were no reasonable alternative sites for serving Cassville. Although it is not stated that the Cassville applicants received return notification letters in an untimely manner, the petitioners complain that there was a delay in receipt by the

104. Dunnegan, Missouri. On January 17, 1992, certain petitioners filed 94 applications proposing the same transmitter site at Dunnegan, Missouri. After reviewing each of these applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated March 17, 1993. The letters indicated that the applications were returned because the applicant: (1) performed an inadequate interference analysis by failing to serve all affected parties and to consider all previously proposed or authorized ITFS or MMDS stations as required by § 21.902; (2) filed past the relevant cut-off period as established in § 21.31 or § 21.914; and (3) filed in the geographic area of an authorized MMDS station or pending MMDS application. The letter also indicated that the applicant's waiver request was denied due to failure to comply with § 21.19 requirements. Reconsideration petitions for the 94 returned applications were filed on April 16, 1993 and August 31, 1993.[159]

105. These 94 applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) one 1983 authorized MMDS station;[160] (2) 24 1983 proposed MMDS stations, with applications pending on January 17, 1992, the filing date of the Dunnegan applications;[161] and (3) six post-1983, previously proposed MMDS stations,

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contact representative, who was the applicant who filed a timely reconsideration petition for Cassville. It is argued that the untimely petitions should be accepted due to the Commission's failure to return applications to the designated contact representative.

[159] Timely reconsideration petitions were filed on behalf of Arthur L. Dalton, the contact representative designated in the Dunnegan applications (Application File No. 00769-CM-P-92 and 00817-CM-P-92). The remaining Dunnegan petitions were jointly filed on August 31, 1993, more than five months after the date of the return letters sent to the applicants, for Application File Nos. 00708-CM-P-92 through 00711-CM-P-92; 00721-CM-P-92; 00722-CM-P-92; 00728-CM-P-92 through 00733-CM-P-92; 00741-CM-P-92 through 00750-CM-P-92; 00762-CM-P-92 through 00768-CM-P-92; 00770-CM-P-92 through 00792-CM-P-92; 00797-CM-P-92 through 00810-CM-P-92; 00814-CM-P-92 through 00816-CM-P-92; 00818-CM-P-92 through 00820-CM-P-92; 00831-CM-P-92 through 00840-CM-P-92; and 00868-CM-P-92 through 00877-CM-P-92. Petitioners complain that they experienced delays in receiving return notification letters which, they contend, should have been sent to the contact representative specified in the application, and state that when the contact representative became aware of the applications' return, all reasonable steps were taken to file a petition. However, petitioners offer no proof that the applicants experienced any delay in receiving the return notification letters.

[160] Station WMI324 at Springfield, Missouri.

[161] These proposed stations include, but are not limited to, Application File Nos. 04630-CM-P-83; 07212-CM-P-83; 11777-CM-P-83; and 13671-CM-P-83.

with applications pending on January 17, 1992.[162] These applications failed to include interference studies, as required by § 21.902(b) and (c), for 30 previously proposed MMDS stations. In addition, the interference study submitted with the applications was inadequate in that it failed to include free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the previously proposed or authorized stations, as required by § 21.902(c), (d) and (f). *See* § 21.902(e). The applicants also failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, the Dunnegan applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

106. The Dunnegan petitioners raise four major arguments. First, petitioners contend that the § 21.31 cut-off rule is inapplicable because it was replaced by § 21.914, and that the Commission failed to indicate whether other applications acceptable for filing were filed before the instant returned applications and to give the Dunnegan applicants an opportunity to disprove the Commission's determination that such other application was indeed acceptable. According to petitioners, they have a procedural and substantive right to challenge the acceptability of any previously filed application. Second, petitioners assert that the Commission misapplied the criteria in the *1988 Public Notice*, which set forth a mechanism for applicants to obtain waivers by demonstrating non-interference. In particular, petitioners contend that their applications contained all of the elements needed for granting any necessary waivers, including the requirement to file interference analyses. Third, petitioners reemphasize that the applicants' interference analyses were sufficient because the applicants considered all previously proposed or authorized ITFS or MMDS stations, and the applications showed that there was no realistic possibility of harmful interference with any other stations. Fourth, petitioners contend that because the required interference analyses showed no harmful interference and that reliable service would be effectively denied to Dunnegan if the applications are not reinstated, it would be arbitrary and capricious to deny the Dunnegan applicants a waiver of the *1988 Public Notice* location restrictions.

107. Kennett, Missouri. On June 10, 1991, certain petitioners filed 97 applications proposing the same transmitter site at Kennett, Missouri. After reviewing each of the Kennett applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated March 3, 1993. The letters indicated that each application was returned because the applicant: (1) filed in the geographic area of authorized or pending MMDS applications and (2) submitted inadequate interference analyses due to the applicant's failure to consider all previously proposed or authorized ITFS or MMDS stations and failure to serve all affected parties.

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[162] Application File Nos. 50530-CM-P-92; 57302-CM-P-91; 57301-CM-P-91; 50123-CM-P-92; 61256-CM-P-91; and 61255-CM-P-91.

With regard to the applicants' request for a waiver of the 50 mile location restriction in the *1988 Public Notice*, the return letters indicated that the applications failed to meet the waiver requirements in § 21.19, and that without a waiver, the applications were unacceptable for filing. Ninety eight reconsideration petitions for these 97 returned applications were filed on April 2, 1993 or August 6, 1993.[163]

108. These 97 applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) one 1983 authorized MMDS station at Union City, Tennessee;[164] (2) one 1983 proposed MMDS station, whose application was pending on June 10, 1991, the filing date of the Kennett applications;[165] and (3) 30 post-1983,

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[163] Individual reconsideration petitions were timely filed, on April 2, 1993, for 15 of the Kennett applications (Application File Nos. 59679-CM-P-91; 59681-CM-P-91; 59682-CM-P-91; 59686-CM-P-91; 59700-CM-P-91; 59702-CM-P-91; 59703-CM-P-91; 59706-CM-P-91; 59718-CM-P-91; 59724-CM-P-91 through 59726-CM-P-91; 59748-CM-P-91; 59751-CM-P-91; and 59758-CM-P-91). A second reconsideration petition was filed, on August 6, 1993, for Application File No. 59682-CM-P-91 and for 41 other applications for the E channel (Application File Nos. 59660-CM-P-91 through 59678-CM-P-91; 59680-CM-P-91; 59683-CM-P-91 through 59685-CM-P-91; 59687-CM-P-91 through 59697-CM-P-91; 59699-CM-P-91; 59701-CM-P-91; 59704-CM-P-91; 59705-CM-P-91; and 59707-CM-P-91 through 59709-CM-P-91). Forty one applicants for the F channel also filed a joint petition for reconsideration on August 6, 1993 (Application File Nos. 59710-CM-P-91; 59712-CM-P-91 through 59717-CM-P-91; 59719-CM-P-91 through 59723-CM-P-91; 59727-CM-P-91 through 59740-CM-P-91; 59742-CM-P-91 through 59747-CM-P-91; 59749-CM-P-91; 59750-CM-P-91; and 59752-CM-P-91 through 59757-CM-P-91). The Kennett petitions did not include Application File No. 59741-CM-P-91, which specified that same transmitter site at Kennett, and was filed and returned on the same dates as the petitioned applications.

The August petitions were filed more than five months after the date of the return letters sent to the Kennett applicants and thus, were untimely. Petitioners maintain that MMDS applicants in some markets have experienced delays in receiving return notification letters, attaching letters from two San Diego, Texas applicants claiming that the correct applications were not attached to the return notification letters these San Diego applicants received in a timely fashion, and further imply that their Kennett filing was somehow delayed because the Commission did not mail a copy of each return letter to the contact representative listed in the applications. Petitioners offered no evidence that they experienced any delay in receiving the return notification letters relating to the Kennett applications.

[164] Station WGW628.

[165] Application File No. 08767-CM-P-83.

previously proposed MMDS stations, with applications pending on June 10, 1991.[166] These 97 Kennett applications failed to include interference studies, as required by § 21.902(b) and (c), for 31 previously proposed MMDS stations with applications pending. In addition, the one interference study submitted with each application was inadequate in that it failed to submit free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the authorized station as required by § 21.902(c), (d) and (f). *See* § 21.902(e). The applicants also failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, these 97 Kennett applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

109. On reconsideration, the timely petitioners assert that the Kennett applications were acceptable for filing and contained all necessary waiver requests. In support, petitioners maintain that they filed interference studies and served all known existing or proposed MMDS and ITFS stations within 50 miles, and that if additional stations do exist, petitioners should not be penalized if it is impossible to identify these other filings from the Commission's data base.[167] Petitioners further assert that since their interference analyses demonstrated that there is no realistic possibility of harmful interference to any other existing or proposed station, and they have committed to make every effort to avoid harmful interference to others and to cooperate in good faith should any interference occur in the future, the denial of their waiver request is arbitrary and capricious.[168] Petitioners also argue that the Commission's decision to return the Kennett applications for alleged non-compliance with the *1988 Public Notice* is similarly misplaced, because the *1988 Public Notice* specifically contemplates the granting of waivers of the 50 mile restriction where the applicant has demonstrated non-interference, as petitioners claim they have done here.[169] Petitioners also assert that reliable service to Kennett would be effectively denied if the Commission's decision is

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[166] Two of these applications, for Sikeston, Missouri (Application File No. 57295-CM-P-91) and Union City, Tennessee (Application File No. 50531-CM-P-90) have since been granted. Another applicant is the tentative lottery selectee for Poplar Bluff, Missouri (Application File No. 55750-CM-P-90).

[167] Petitioners also complain that returning their applications for failing to file the required interference studies is disingenuous in light of the fact that the Commission has waived the requirements of § 21.902(c)(2) for applicants at the time of filing, citing *Donald E. Benson*.

[168] Petitioners cite *Austin Movie* for the proposition that the Commission may grant applications despite potential interference when an applicant shows that the potential interference problems have been resolved.

[169] Petitioners also cite the *Lawrence N. Brandt*, *Marylan J. Benson* and *Donald E. Benson* cases in support of their request for waiver of the 50 mile benchmark.

allowed to stand, and that a grant of their waiver request would effectuate the "underlying purpose" of the pertinent rules, which they claim, is to avoid harmful interference. Petitioners further contend that the Commission's summary return of the Kennett applications, which demonstrate no harmful interference to any other existing or proposed stations, is procedurally unfair, arbitrary and capricious, since it adopts more stringent separation standards *ex post facto*.[170]

110. New Brunswick, New Jersey. On July 18, 1991, a petitioner filed one application, proposing a transmitter site at New Brunswick, New Jersey.[171] After reviewing the application, the Commission staff returned it as defective and unacceptable for filing by return notification letter dated March 17, 1993. The letter indicated that the application was returned because the applicant: (1) filed past the cut-off period established in §§ 21.31 or 21.914; (2) filed in an area not open for filing pursuant to §21.901(d)(4) as it did not meet the criteria established in *1988 Public Notice*, which specifically states that an applicant may not file in a geographic area of an authorized MMDS station or a pending MMDS application; (3) filed inadequate interference analysis pursuant to § 21.902 due to applicant's failure to serve all affected parties pursuant to § 21.902(g) and/or failure to consider all previously proposed or authorized ITFS or MMDS stations pursuant to § 21.902(c) and/or 21.902(i); and (4) the applicant did not comply with the *MMDS Allocation Order*.[172] A reconsideration petition was filed on August 3, 1993.[173]

111. This applicant selected a transmitter site within the Philadelphia, Pennsylvania MSA, and thus, is mutually exclusive with and cut-off by authorized and previously proposed stations within that MSA, pursuant to § 21.901(d)(5). This applicant also proposed a transmitter site that is within 50 miles or the radio horizon of: (1) one 1983 authorized MMDS station;[174] (2) 138 1983 proposed MMDS stations,[175]

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[170] The untimely August petitions also list the following reasons why return of the Kennett applications was inappropriate: (1) insufficient detailing of the specific reasons for such returns; (2) no indication of which applications establish any valid cut-off period, thus denying applicants' *Ashbacker* rights; (3) Commission failure to properly enunciate its rules and reasons for return, citing *McElroy Electronics*; and (4) incorrect application by the Commission of the 50 mile rule.

[171] Application File No. 60816-CM-P-91.

[172] The applicant filed within the Philadelphia MSA or its buffer zone.

[173] This petition was filed more than four months after the date of the return letter sent to the applicant and thus, was untimely.

[174] WHT644 in Philadelphia, Pennsylvania.

with applications pending on July 18, 1991, the filing date of the New Brunswick application; and (3) 166 post-1983, previously proposed MMDS stations,[176] with applications pending on July 18, 1991. This New Brunswick application failed to include interference studies, as required by § 21.902(b) and (c), for one authorized MMDS station and 301 previously proposed MMDS stations with applications pending. The interference studies that were submitted were inadequate in that the applicant failed to engineer the proposed station to provide 45 dB of cochannel interference protection pursuant to § 21.902(b)(3), and 0 dB of adjacent channel interference protection pursuant to § 21.902(b)(4). This applicant also failed to comply with the requirements of § 21.901(d)(1) for ITFS interference protection because free space calculations were not submitted for each registered receive site of six ITFS licensee with an authorized transmitter site within 50 miles of the proposed New Brunswick transmitter site.[177] In addition, the applicant failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, this applicant failed to demonstrate that the station proposed in the returned application would not cause harmful interference to authorized or previously proposed stations.

112. Belen, New Mexico. On October 7, 1991, certain petitioners filed 94 applications proposing the same transmitter site at Belen, New Mexico. After reviewing each of the Belen applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated May 28, 1992. The letters indicated that each application was returned because the applicant filed in the geographic area of authorized MMDS stations. The return letters also indicated that the applicants' waiver requests were denied due to failure to comply with § 21.19 requirements and that, without grant of the waivers, the applications failed to comply with the Commission's rules, and thus, were unacceptable for filing. Reconsideration petitions were filed for the returned Belen applications on July 23, 1992.[178]

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[175] Including, but not limited to, Application File Nos. 03941-CM-P-83; 08228-CM-P-83; 08579-CM-P-83; 05577-CM-P-83; 01908-CM-P-83; 14005-CM-P-83; 01078-CM-P-83; 07691-CM-P-83; 03074-CM-P-83; 06926-CM-P-83; 11328-CM-P-83; 02647-CM-P-83; 04080-CM-P-83; 00797-CM-P-83; 03454-CM-P-83; 05389-CM-P-83; 06573-CM-P-83; 00877-CM-P-83; and 03315-CM-P-83. Application File Nos. 03941-CM-P-83 (WHT643 in Philadelphia, Pennsylvania), 08228-CM-P-83 (WMI860 in Allentown, Pennsylvania), and 08579-CM-P-83 (WLR500 in New York, New York) were subsequently granted.

[176] Including, but not limited to, Application File Nos. 59016-CM-P-91 through 59065-CM-P-91.

[177] Stations WHR872 (Piscataway, New Jersey), WHR520, KNZ70 and KRS82 (New York, New York), KVS31 (Brooklyn, New York), and KRS83 (Yonkers, New York).

[178] Reconsideration petitions were filed for Application File Nos. 50125-CM-P-92 through 50136-CM-P-92 and 50138-CM-P-92 through 50219-CM-P-92. These petitions were filed almost after the date of the return letters and thus, were untimely.

113. These 94 applications proposed a transmitter site that is within 50 miles or the radio horizon of two 1983 authorized MMDS stations[179] and two post-1983, previously proposed MMDS stations, with applications pending on October 7, 1991, the filing date of the Belen applications.[180] These applicants failed to include interference studies, as required by § 21.902(b) and (c), for the two post-1983, previously proposed stations. In addition, the interference studies submitted with the applications were inadequate because they failed to include free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the previously proposed or authorized stations as required by § 21.902(c), (d) and (f). *See* § 21.902(e). These applicants also failed to comply with the requirements of § 21.901(d)(1) for ITFS interference protection because free space calculations were not submitted for each registered receive site of Station WHR672 (Albuquerque, New Mexico), an ITFS station with an authorized transmitter site within 50 miles of the proposed Belen transmitter site. Furthermore, the applicants failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, the Belen applicants failed to demonstrate that the station proposed in the returned applications would not cause harmful interference to the authorized stations.

114. The Belen petitioners assert that their applications contained all necessary elements for the grant of the requested waivers, including the required interference analyses which were properly served. Specifically, the Belen petitioners contend that because all required interference analyses were supplied and showed that no harmful interference would result from granting the applications, the Commission acted arbitrarily and capriciously in returning the applications without a "hard look" at the applicants' eligibility for a waiver of the location restriction contained in the *1988 Public Notice* and without a careful review of the applicants' showings. Petitioners further argue that reliance by the Commission on the *1988 Public Notice* was misplaced because

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Petitioners attach a declaration from an "agent" of the contact representative specified in the applications, stating that she did not receive the return letters until July 8, 1992. Petitioners argue that the petitions should be considered timely because the delay in delivery or misdating of the return letters made compliance with the 30 day filing period impossible and that petitioners filed within 30 days of receiving the return letters. Petitioners cite *MCI v. FCC* and *Foods and Beverage Trades Dept.*, for the respective propositions that public notice of an order is given only when the decision becomes available to the litigants, and that acceptance of a petition is required where a defect in mailing notification makes it impossible for the affected party to comply with the established deadline. Petitioners also cite *Gardner v. FCC* and *Pacific FM, Inc.*, stating that a petitioner must file promptly after receiving late actual notice.

[179] **Stations WHT661 and WHT662 (Albuquerque, New Mexico).**

[180] **Application File Nos. 60634-CM-P-91 (WMI417) and 60633-CM-P-91 (WMI416) in Socorro, New Mexico, were subsequently authorized.**

the *Public Notice* established a mechanism for applicants to demonstrate non-interference. They also argue that the other MMDS stations noted in their applications cannot reliably serve Belen, New Mexico.[181]

115. Bladenboro, North Carolina. On October 28, 1991, certain petitioners filed 129 MMDS applications proposing the same transmitter site at Bladenboro, North Carolina. After reviewing each of the 129 Bladenboro applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letter dated June 12, 1992. The letters indicated that each application was returned because the applicant: (1) filed in the geographic area of other authorized MMDS stations or pending MMDS applications; and (2) filed a waiver request that failed to comply with § 21.19 requirements. One hundred thirty-one reconsideration petitions were filed on July 9, 1992, for the 129 returned applications.[182]

116. These 129 applications propose a transmitter site that is within 50 miles or the radio horizon of (1) 13 1983 proposed MMDS stations, with applications pending on October 28, 1991, the filing date of the Bladenboro applications[183] and (2) 71 post-1983, previously proposed MMDS stations, with applications pending on October 28, 1991.[184]

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[181] Petitioners state that the return notification letters included the statement "filed in geographic area of pending MMDS application." In fact, the return notification letters informed petitioners that their proposed applications were "filed in geographic area of *authorized* MMDS station[s]."

[182] Reconsideration petitions were filed for Application File Nos. 51026-CM-P-92 through 51034-CM-P-92; 51036-CM-P-92 through 51147-CM-P-92; and 51150-CM-P-92 through 51157-CM-P-92. In a few instances, the same attorney submitted multiple petitions for the same application. Reconsideration petitions were not filed for Application File Nos. 51035-CM-P-92; 51148-CM-P-92; and 51149-CM-P-92, which also proposed the same transmitter site at Bladenboro, and were filed and returned on the same dates as the petitioned applications.

[183] Five 1983 applications propose a transmitter site at Fayetteville, North Carolina (Application File Nos. 10811-CM-P-83; 13937-CM-P-83; 00496-CM-P-83; 15474-CM-P-83; and 06436-CM-P-83); two propose a transmitter site at Florence, South Carolina (Application File Nos. 09931-CM-P-83 and 08181-CM-P-83); and six propose a transmitter site at Wilmington, North Carolina (Application File Nos. 10735-CM-P-83; 13853-CM-P-83; 10941-CM-P-83; 10046-CM-P-83; 00780-CM-P-83; and 01676-CM-P-83). Application File Nos. 06436-CM-P-83 (WMI817) for Florence, South Carolina and 01676-CM-P-83 (WMI297) for Wilmington, North Carolina were granted subsequent to the filing of the Bladenboro applications.

[184] These post-1983 applications propose a transmitter site at Fayetteville, North Carolina (including, but not limited to Application File Nos. 54838-CM-90 through 54846-CM-P-90 and 53423-CM-P-90 through 53429-CM-P-90).

These 129 Bladenboro applications failed to include interference studies, as required by § 21.902(b) and (c), for 81 previously proposed MMDS stations with applications pending. The interference studies submitted with the applications were inadequate in that they failed to include free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the authorized or previously proposed stations as required by § 21.902(c), (d) and (f). *See* § 21.902(e). These applicants also failed to comply with the requirements of § 21.901(d)(1) for ITFS interference protection because free space calculations were not submitted for each registered receive site of one ITFS licensee with an authorized transmitter site within 50 miles of the proposed Bladenboro transmitter site.[185] In addition, the applicants failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, these 129 Bladenboro applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

117. The Bladenboro petitioners assert that the returned applications contained the necessary elements for granting a § 21.19 waiver of the Commission's 50 mile location restriction, including all required interference analyses. Chiefly, the Bladenboro petitioners contend that the required interference analyses were served on the affected parties, filed with the Commission, and demonstrated that no harmful interference would result from grant of the applications. Petitioners claim that no objections were received from the MMDS applicants upon whom the interference analyses were served. According to petitioners, the distance between the proposed Bladenboro site and the other previously proposed or authorized stations, prevents the occurrence of harmful interference, and would also hinder these previously proposed stations from providing reliable service to Bladenboro. Petitioners further argue that the waiver request fully complied with Commission rules by showing the lack of a reasonable alternative site, and that without grant of the waiver, reliable service to the proposed service area would be effectively denied. Petitioners maintain that the Commission has previously granted an MDS application, notwithstanding possible interference to the signals within the protected service area of another facility, when the applicant's engineering analysis and agreement with potentially affected parties overcame the presumption of harmful interference, citing *Austin Movie*. Claiming to have met all service and filing requirements and committed to continued cooperation in the avoidance of harmful interference, petitioners contend that the Commission acted arbitrarily and capriciously by returning the applications without a "hard look." Petitioners conclude that the Commission's failure to review the applications carefully results in the adoption of "more stringent separation standards *ex post facto*," and that denial of the waiver request defeats the underlying purpose of the *Public Notice* requirements.

118. Ellerbe, North Carolina. On October 21, 1991, certain petitioners filed 132

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[185] **Station WHN714 (Aynor, South Carolina).**

MMDS applications proposing the same transmitter site at Ellerbe, North Carolina. After reviewing each of the Ellerbe applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated April 28, 1992. The letters indicated that each application was returned because the applicant: (1) filed in the geographic area of a pending MMDS application; and (2) failed to meet the requirements in § 21.19 for grant of a waiver, and without a waiver, the application failed to comply with the Commissions rules and thus, was unacceptable for filing. One hundred and thirty-four reconsideration petitions for the 132 returned MMDS applications were filed on May 28, 1992 and/or August 31, 1993.[186]

119. These 132 applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) seven 1983 proposed MMDS stations, with applications pending on the filing date of the Ellerbe applications, October 21, 1991;[187] and (2) 71 post-1983, previously proposed MMDS stations,[188] with applications pending on October 21, 1991. These applications failed to include interference studies, as required by § 21.902(b) and (c), for 76 previously proposed MMDS stations with applications pending. These applicants also failed to comply with the requirements of § 21.901(d)(1) for ITFS interference protection because free space calculations were not submitted for each registered receive site of WHR614 (Bennettsville, South Carolina), an ITFS station with an authorized transmitter site within 50 miles of the proposed Ellerbe transmitter site. In addition, the applicants failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, the Ellerbe applicants failed to demonstrate that the station proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

120. On reconsideration, the Ellerbe applicants maintain that the returned applications contained all necessary elements for grant of the requested waiver of the 50 mile location restriction set forth in the *1988 Public Notice*. Petitioners argue that the required interference analyses were submitted and served, and demonstrated that the

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[186] Reconsideration petitions were filed for Application File Nos. 50538-CM-P-92 through 50558-CM-P-92; 50560-CM-P-92 through 50622-CM-P-92; and 50624-CM-P-92 through 50671-CM-P-92. A second petition was submitted for Application File Nos. 50628-CM-P-92 and 50629-CM-P-92 on August 31, 1993.

[187] Application File Nos. 06436-CM-P-83; 01558-CM-P-83; 07960-CM-P-83; 00496-CM-P-83; 15474-CM-P-83; 10811-CM-P-83; and 13937-CM-P-83. Application File No. 06436-CM-P-83 was subsequently granted (WMI817 at Fayetteville, Arkansas).

[188] These post-1983, previously proposed MMDS stations include, but are not limited to, Application File Nos. 52100-CM-P-91; 52022-CM-P-91; 55100-CM-P-91; 52856-CM-P-91; 52471-CM-P-91; 52416-CM-P-91; 52658-CM-P-91; 55927-CM-P-90; 55084-CM-P-90; 54838-CM-P-90 through 54846-CM-P-90; 54825-CM-P-90; 54581-CM-P-90; 54527-CM-P-90; and 53792-CM-P-90 through 53797-CM-P-90.

proposed station would not cause harmful interference to then existing MMDS operations or previously proposed applicants. Petitioners further argue that a waiver would serve the public interest because previously filed MMDS facilities would not technically be able to serve the special needs of Ellerbe, and that in denying the request for a waiver, the Commission would effectively preclude MMDS service to Ellerbe on a reliable basis. Petitioners also contend that the Commission acted arbitrarily and capriciously by returning the applications without a "hard look."

121. Grantsboro, North Carolina. On March 19, 1992, certain petitioners filed 66 applications proposing the same transmitter site at Grantsboro, North Carolina. After reviewing these Grantsboro applications, the Commission staff returned each of the 66 applications as defective and unacceptable for filing by return notification letters dated March 17, 1993. The letters indicated that each application was returned because the applicant (1) filed past the cut-off period established in §§ 21.31 and 21.914; (2) filed in the geographic area of other pending MMDS applications; and (3) submitted an inadequate interference analysis due to failure to consider all previously proposed or authorized ITFS or MMDS stations and to serve all affected parties. With regard to the applicants' request for a waiver of the 50 mile location restriction in the *1988 Public Notice*, the return letters indicated that the applications failed to meet the waiver requirements in § 21.19, and that without a waiver, the applications were unacceptable for filing. On April 16, 1993, July 27, 1993, or August 31, 1993, 72 reconsideration petitions were filed for the 66 returned applications[189] and for four applications that had

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[189] Individual reconsideration petitions were timely filed, on April 16, 1993, for 21 Grantsboro applications. (Application File Nos. 03059-CM-P-92; 03079-CM-P-92; 03088-CM-P-92; 03092-CM-P-92; 03099-CM-P-92; 03104-CM-P-92; 03106-CM-P-92; 03108-CM-P-92; 03109-CM-P-92; 03125-CM-P-92; 03157-CM-P-92; 03159-CM-P-92; 03240-CM-P-92; 03246-CM-P-92; 03250-CM-P-92; 03253-CM-P-92; 03257-CM-P-92; 03259-CM-P-92; 03266-CM-P-92; 03309-CM-P-92; and 03317-CM-P-92.) On July 27, 1993, 40 Grantsboro applicants jointly filed two petitions, one for 19 returned applications for the F channel (Application File Nos. 03061-CM-P-92 through 03065-CM-P-92; 03078-CM-P-92; 03095-CM-P-92; 03101-CM-P-92; 03105-CM-P-92; 03110-CM-P-92 through 03112-CM-P-92; 03277-CM-P-92; 03304-CM-P-92; 03308-CM-P-92; 03310-CM-P-92; 03312-CM-P-92; 03318-CM-P-92; and 03321-CM-P-92), and the other for 21 returned applications for the E channel (Application File Nos. 03124-CM-P-92; 03149-CM-P-92; 03150-CM-P-92; 03158-CM-P-92; 03163-CM-P-92; 03174-CM-P-92; 03175-CM-P-92; 03216-CM-P-92 through 03218-CM-P-92; 03221-CM-P-92; 03222-CM-P-92; 03237-CM-P-92; 03239-CM-P-92; 03243-CM-P-92; 03247-CM-P-92; 03248-CM-P-92; 03267-CM-P-92 through 03269-CM-P-92; and 03279-CM-P-92). A second petition was filed, on August 31, 1993, for Application File Nos. 03092-CM-P-92 and 03257-CM-P-92, and for nine other applications (Application File Nos. 03103-CM-P-92; 03186-CM-P-92 through 03189-CM-P-92; 03219-CM-P-92; 03224-CM-P-92; 03260-CM-P-92; and 03306-CM-P-92). The July and August petitions were filed four and five months after

not been returned.[190]

122. These 66 applications propose a transmitter site that is within 50 miles or the radio horizon of (1) nine 1983 proposed MMDS stations, with applications pending on March 19, 1992, the filing date of the Grantsboro applications[191] and (2) three post-1983, previously proposed MMDS stations, with applications pending on March 19, 1992.[192] These 66 Grantsboro applications failed to include interference studies, as required by § 21.902(b) and (c), for ten previously proposed MMDS stations with applications pending. In addition, the interference studies submitted with the applications were inadequate in that they failed to submit free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the previously proposed stations as required by § 21.902(c), (d) and (f). *See* § 21.902(e). The applicants also failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, these 66 Grantsboro applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

123. On reconsideration, petitioners assert that the Grantsboro applications contained all necessary elements for acceptance of the application and grant of any necessary waivers. Petitioners argue that the Commission staff erred in returning the applications as cut-off since the return letters did not identify any previously filed applications, and that until the Commission specifically identifies these applications and

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the date of the return letters sent to the applicants and thus, were untimely. To justify their late filing, petitioners: (1) complain that MMDS applicants in some markets experienced delays in receiving return notification letters, attaching letters from two San Diego, Texas applicants alleging that the correct applications were not attached to the return notification letters these San Diego applicants received in a timely fashion, and (2) imply that the Grantsboro filing was somehow delayed because the Commission did not mail a copy of each return letter to the contact representative listed in the applications, thereby creating the possibility of insufficient notice, citing *McElroy Communications.*

[190] Application File Nos. 3186-CM-P-92 through 3189-CM-P-92 are still pending. Thus, the petitions filed on behalf of these applicants will be dismissed as premature.

[191] On March 19, 1992, there were eight pending 1983 applications at Jacksonville, North Carolina and one pending 1983 application at Greenville, North Carolina. Application File Nos. 1225-CM-P-83 (Greenville), 10586-CM-P-83 (Jacksonville) and 9949-CM-P-83 (Jacksonville) have since been granted. We note that most of these pending 1983 MMDS applications were placed on public notice in November 1986, more than five years prior to the filing of petitioners' applications.

[192] These were Application File Nos. 52861-CM-P-92 and 52862-CM-P-92 (Belhaven, North Carolina) and 2403-CM-P-92 (New Bern, North Carolina).

allows a reasonable period for review and comment, the Grantsboro applicants' *Ashbacker* rights have been denied.[193] Petitioners further argue that the decision to return the Grantsboro applications for non-compliance with the *1988 Public Notice* is similarly misplaced, because the *Notice* specifically contemplates the granting of waivers of the 50 mile restriction where the applicant has demonstrated non-interference, as petitioners claim to have done here.[194] Petitioners also assert that they served all known existing or proposed MMDS and ITFS stations within 50 miles, and that if additional stations do exist, petitioners should not be penalized if it is impossible to identify these other filings from the Commission's data base. According to petitioners, the decision to deny their waiver request is arbitrary and capricious since they purportedly demonstrated that no harmful interference would result to any other station, and reliable service to Grantsboro would be denied if the decision is allowed to stand.

124. Kenansville, North Carolina. On October 21, 1991, certain petitioners filed 131 applications proposing the same transmitter site at Kenansville, North Carolina. After reviewing each of the Kenansville applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated June 22, 1992. The letters indicated that each application was returned because the applicant filed in the geographic area of pending MMDS applications or authorized MMDS stations. With regard to the applicants' request for a waiver of the 50 mile location restriction set forth in the *1988 Public Notice*, the return letters indicated that the applications failed to meet the waiver requirements of § 21.19, and that without a waiver, the applications were unacceptable for filing. Reconsideration petitions were filed for the 131 returned applications on July 21, 1992.[195]

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[193] Petitioners misinterpret the return letters as applying the cut-off periods established in both § 21.31 and § 21.914. While, as petitioners correctly point out, the public notice cut-off procedure in § 21.31 was replaced by the same calendar day cut-off rule specified in § 21.914 for applications filed after October 31, 1990, the two rules still must be read in conjunction, because § 21.31 defines such relevant terms as "mutually exclusive" and "newly filed application."

[194] Petitioners also cite *Austin Movie, Lawrence N. Brandt, Marylan J. Benson*, and *Donald E. Benson* as instances where the Commission has indicated it would waive the requirements of § 21.902. Petitioners further contend that the summary return of the Grantsboro applications, which purportedly demonstrate no harmful interference to any other existing or proposed stations, is procedurally unfair, arbitrary and capricious, since it adopts more stringent separation standards *ex post facto*.

[195] Petitions were filed for Application File Nos. 50672-CM-P-92 through 50786-CM-P-92 and; 50789-CM-P-92 through 50805-CM-P-92. No petition was filed for Application File No. 50713-CM-P-92, which specified the same transmitter site as the Kenansville applications, was filed on the same day, and returned at the same time.

125. These 131 applications propose a transmitter site that is within 50 miles or the radio horizon of 13 1983 previously proposed MMDS stations, whose applications were pending on October 21, 1991, the filing date of the Kenansville applications.[196] These applications failed to include interference studies, as required by § 21.902(b) and (c) for 10 previously proposed MMDS stations with applications pending. Also, the interference study actually submitted was inadequate because it failed to include free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the authorized or previously proposed stations as required by § 21.902(c), (d), and (f). *See* § 21.902(e). In addition, the applicants failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g) for all previously proposed or authorized MMDS applicants, conditional licensees and licensees. Thus, the Kenansville applicants failed to demonstrate that the station proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

126. The petitions for reconsideration of the Kenansville applications primarily assert that the returned applications contained all the necessary elements, including the required interference analyses, for the granting of a waiver. These petitions contend that, because all required interference analyses were supplied and showed that no harmful interference would result from granting the applications,[197] the Commission acted arbitrarily and capriciously in returning the applications without taking a "hard look" at the applicants' eligibility for a waiver as required by *WAIT Radio*. In addition, the petitioners, citing *Austin Movie*, maintain that the Commission has previously granted an MDS application, notwithstanding possible interference to the signals within the protected service area of another facility, when the applicant's engineering analysis and agreement with potentially affected parties overcame the presumption of harmful interference. The petitioners accordingly conclude that the

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[196] These 13 applications include seven applications for Jacksonville, North Carolina (Application File Nos. 07734-CM-P-83; 01232-CM-P-83; 00557-CM-P-83; 10586-CM-P-83; 10839-CM-P-83; 09949-CM-P-83; and 02179-CM-P-83); four for Fayetteville, North Carolina (06436-CM-P-83; 10811-CM-P-83; 13937-CM-P-83; and 15474-CM-P-83); one for Raleigh, North Carolina (12405-CM-P-83); and one for Greenville, North Carolina (01225-CM-P-83). Application File Nos. 10586-CM-P-83 (WHM601); 09949-CM-P-83 (WMI828 for Jacksonville, North Carolina); 06436-CM-P-83 (WMI817 for Greenville, North Carolina); and 01225-CM-P-83 (WMI838 for Fayetteville, North Carolina) were subsequently granted.

[197] Petitioners cite the *Lawrence N. Brandt* case as confirmation of the Commission's policy permitting waiver of the 50-mile location restrictions upon a showing of lack of harmful interference to cochannel or adjacent channel stations operating within 50 miles or the radio horizon of a proposed transmitter site, and to distinguish the instant waiver request from two that were denied for having failed to provide all of the requisite interference analyses.

Commission's failure to review the applications carefully, results in the adoption of "more stringent separation standards *ex post facto*," and that the denial of the waiver request defeats the underlying purpose of the interference analysis and *Public Notice* requirements.

127. Midway, North Carolina. On February 26 and 27, 1991, certain petitioners filed 34 applications proposing the same transmitter site at Midway, North Carolina. After reviewing each of the Midway applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated March 17, 1993. The letters indicated that each application was returned because the applicant: (1) filed past the cut-off period established in §§ 21.31 or 21.914, and (2) filed in the geographic area of other authorized MMDS stations or pending MMDS applications. The return letters also indicated that the applicant's waiver request was filed later, rather than with the initial application as required by § 21.10; thus, the applications were not in compliance with the rules and returned as unacceptable for filing. Thirty-five reconsideration petitions for the returned applications were filed on April 16, 1993, July 27, 1993 and August 31, 1993.[198]

128. These 34 applications propose a transmitter site that is within 50 miles or the radio horizon of eight 1983 proposed MMDS stations, with applications pending on

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[198] **Individual reconsideration petitions were timely filed on April 16, 1993 for seven of the Midway applicants (Application File Nos. 58368-CM-P-91; 58382-CM-P-91; 58387-CM-P-91; 58388-CM-P-91; 58391-CM-P-91; 58392-CM-P-91; and 58396-CM-P-91). On July 27, 1993, 24 additional applicants for Channel Group E filed a joint petition for reconsideration (Application File Nos. 58369-CM-P-91 through 58376-CM-P-91; 58378-CM-P-91; 58379-CM-P-91; 58381-CM-P-91; 58383-CM-P-91 through 58386-CM-P-91; 58389-CM-P-91; 58390-CM-P-91; 58393-CM-P-91; 58395-CM-P-91; 58397-CM-P-91; 58398-CM-P-91; and 58400-CM-P-91 through 58402-CM-P-91). The caption on the July petition lists Application File No. 58379-CM-P-91 twice. The caption also lists Zonnie Jones, Jr. as a petitioner for Application File No. 4061-CM-P-91. The Commission has never received an application on behalf of Zonnie Jones for Midway, North Carolina, and the file number given has never been assigned to any MMDS application. On August 31, 1993, an additional joint petition was filed on behalf of Application File Nos. 58380-CM-P-91; 58394-CM-P-91; and 58399-CM-P-91. No petition was filed for Application File No. 58377-CM-P-91, which proposed the same transmitter site, and was filed and returned as the same dates as the petitioning applicants. The July and August petitions are untimely, as they were filed four and five months after the date of the return notification letters. The untimely petitioners assert that their petitions should be accepted because "in several instances" the Commission failed to return applications to the designated "contact representative."**

February 27, 1991, the filing date of the Midway applications.[199] The 34 Midway applications failed to include interference studies, as required by § 21.902(b) and (c), for these eight previously proposed MMDS stations with applications pending. The interference studies submitted with the applications were inadequate in that they failed to include free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the previously proposed or authorized stations as required by § 21.902(c), (d) and (f). *See* § 21.902(e). These applicants also failed to comply with the requirements of § 21.901(d)(1) for ITFS interference protection because free space calculations were not submitted for each registered receive site of Station WHR940 (Franklin, Virginia), an ITFS station with an authorized transmitter site within 50 miles of the proposed Midway transmitter site. In addition, the applicants failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, these applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

129. The Midway petitioners primarily assert that the returned applications contained all necessary elements for acceptance of the application and grant of any necessary waivers.[200] Petitioners argue that the Commission staff erred in returning the applications as cut-off since the return letters did not identify any previously filed applications, and that until the Commission specifically identifies these applications and allows a reasonable period for review and comment, the Midway applicants' *Ashbacker* rights have been denied.[201] Petitioners further argue that the decision to return the Midway applications for non-compliance with the *1988 Public Notice* is similarly misplaced, since the *Public Notice* specifically contemplates the granting of waivers of the

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[199] Application File Nos. 04284-CM-P-83; 06214-CM-P-83; 08530-CM-P-83; 11828-CM-P-83; 11837-CM-P-83; 11838-CM-P-83; 15821-CM-P-83 (Norfolk, Virginia) and Application File No. 0943-CM-P-83 (Greenville, North Carolina).

[200] Some of the applicants requested waiver of the 50 mile location restriction in letters filed in January, 1992, attempting to supplement their applications filed approximately 11 months earlier. Since the waiver requests did not accompany the applications, the Midway petitioners' waiver requests fail to meet the requirements of the Commission's rules. *See* §§ 21.20(c)(1) and 21.19. Where relevant, the return letters indicated that later-filed waiver requests did not satisfy the Commission's rules regarding waivers.

[201] Petitioners misinterpret the return letters as applying the cut-off periods established in both § 21.31 and § 21.914. While, as petitioners correctly point out, the public notice cut-off procedure in § 21.31 has been replaced by the same calendar day cut-off rule specified in § 21.914 for applications filed after October 31, 1990, the two rules must still be read in conjunction, since § 21.31 defines such relevant terms as "mutually exclusive" and "newly filed application."

50 mile restriction where the applicant has demonstrated non-interference, as petitioners claim they have done here.[202] Petitioners also assert that they served all known existing or proposed MMDS and ITFS stations within 50 miles, and that if additional stations do exist, petitioners should not be penalized if it is impossible to identify these other filings from the Commission's database. According to petitioners, the decision to deny their waiver requests is arbitrary and capricious since they purportedly demonstrated that no harmful interference would result to any other station, and reliable service to Midway would be denied if the decision is allowed to stand.

130. Ashley-Wishek, North Dakota. On November 12, 1991, certain petitioners filed 56 MMDS applications, proposing the same transmitter site at Ashley-Wishek, North Dakota. After reviewing each of these 56 Ashley-Wishek applications, the Commission staff returned each as defective and unacceptable for filing by return notification letters dated May 19, 1993. The letters indicated that each application was returned because the applicant: (1) filed past the cut-off period established in §§ 21.31 or 21.914; and (2) submitted inadequate interference analyses pursuant to § 21.902 due to applicants' failure to serve all affected parties pursuant to § 21.902(g) and/or failure to consider all previously proposed or authorized ITFS or MMDS stations pursuant to § 21.902(c) and/or § 21.902(i). Fifty-eight reconsideration petitions were filed between June 11, 1993, and August 31, 1993, for the 56 returned applications.[203]

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[202] Petitioners also cite *Austin Movie*, *Lawrence N. Brandt*, *Marylan J. Benson*, and *Donald E. Benson* as cases in which the Commission has indicated it would waive the requirements of § 21.902. Petitioners further contend that the summary return of the Midway applications, which purportedly demonstrate no harmful interference to any other existing or proposed stations, is procedurally unfair, arbitrary and capricious, since it adopts more stringent separation standards *ex post facto*.

[203] Petitions for reconsideration were timely filed on June 11, 1993 for Application File Nos. 51490-CM-P-92 through 51492-CM-P-92; 51497-CM-P-92; 51498-CM-P-92; 51503-CM-P-92; 51506-CM-P-92; 51507-CM-P-92; 51510-CM-P-92; 51511-CM-P-92; 51515-CM-P-92; 51516-CM-P-92; 51521-CM-P-92; 51525-CM-P-92; 51528-CM-P-92; 51533-CM-P-92; 51534-CM-P-92; 51535-CM-P-92; 51540-CM-P-92; 51541-CM-P-92; 51546-CM-P-92; 51549-CM-P-92; 51550-CM-P-92; 51553-CM-P-92; 51554-CM-P-92; 51558-CM-P-92; 51559-CM-P-92; 51564-CM-P-92; 51569-CM-P-92; and 51572-CM-P-92. Of these petitions, the following were untimely supplemented on August 3, 1993: 51490-CM-P-92; 51492-CM-P-92; 51516-CM-P-92; 51533-CM-P-92; 51535-CM-P-92; and 51559-CM-P-92.

The following petitions were untimely filed on August 3 or August 31, 1993: Application File Nos. 51499-CM-P-92; 51502-CM-P-92; 51504-CM-P-92; 51509-CM-P; 51512-CM-P-92; 51513-CM-P-92; 51520-CM-P-92; 51524-CM-P-92; 51526-CM-P-92; 51530-CM-P-92; 51536-CM-P-92; 51542-CM-P-92; 51543-CM-P-92; 51545-CM-P-92; 51551-CM-P-92; 51552-CM-P-92; 51555-CM-P-92; 51556-CM-P-92; 51557-CM-P-92; 51560-CM-P-92; 51562-CM-P-92; 51563-CM-P-92; 51567-CM-P-92; 51570-CM-P-92;

131. These 56 applications propose a transmitter site that is within 50 miles or the radio horizon of two post-1983, previously proposed MMDS stations, with applications pending on November 12, 1991, the filing date of the Ashley-Wishek applications.[204] These 56 Ashley-Wishek applications failed to include interference studies, as required by § 21.902(b) and (c), for either of the post-1983, previously proposed MMDS stations with applications pending. In addition, the applicants failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, these 56 applicants failed to demonstrate that the station proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

132. In the timely reconsideration petitions, the Ashley-Wishek applicants argue that the Commission did not sufficiently detail the specific reasons why the applications were rejected for having been filed past the cut-off period established in §§ 21.31 or 21.914. Applicants argue that their applications contained the necessary elements for acceptance and for the grant of any needed waivers. These applicants assert that dismissing the Ashley-Wishek applications for non-compliance with the *1988 Public Notice* is misplaced because the notice contained a mechanism (*i.e.*, interference studies) for applicants to demonstrate non-interference. They argue that their interference analyses demonstrate that the proposed station would not cause harmful interference to then existing MMDS operations or previously proposed applicants. Applicants also assert that if the Commission requires service on any parties not served, the Commission should specify who those parties are. Petitioners further argue that a waiver would serve the public interest because existing or proposed MMDS facilities could not reliably serve Ashley-Wishek. For these reasons, they claim that a decision to deny them a waiver would be arbitrary and capricious and that a form letter rejection does not meet the "hard look" standard as required by *WAIT Radio*. Even though the Ashley-Wishek petitions were timely filed, the applicants additionally claim that because some applications and return letters were returned to applicants rather than "contact representatives," the Commission has "created the possibility of insufficient notice of its actions" and should therefore reinstate these applications under *McElroy Electronics*.

133. In the untimely petitions for reconsideration, applicants argue that the Commission provided insufficient details of the specific reasons for returning the applications. Applicants also argue that their *Ashbacker* rights were violated because they were not told which prior applications established the cut-off period; applicants

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51571-CM-P-92; and 51574-CM-P-92. Duplicate petitions were filed for Application File Nos. 51526-CM-P-92 and 51570-CM-P-92. These untimely petitions purport to incorporate earlier petitions filed for the same applications. However, no such earlier petitions were filed.

[204] Application File Nos. 60458-CM-P-91 and 60459-CM-P-91.

were therefore unable to challenge the applications filed prior to their own. They claim that the Commission did not properly enunciate its rules, policies and reasons for return of the Ashley-Wishek applications and therefore did not engage in reasoned analysis in evaluating their applications, thereby violating *McElroy Electronics.* Applicants also maintain that the Commission incorrectly applied the "so-called 15/50-mile rules" relating to existing or proposed MMDS stations. Applicants assert that the Ashley-Wishek applications fully complied with the Commission's rules and waiver requirements.[205] They further argue that a waiver would serve the public interest because previously filed MMDS facilities could not reliably serve Ashley-Wishek. For these reasons, they claim that a decision to deny them a waiver would be arbitrary and capricious.

134. Coshocton, Ohio. On November 12, 1991, certain petitioners filed 131 applications proposing the same transmitter site at Coshocton, Ohio. After reviewing these Coshocton applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated October 14, 1992, or November 4, 1992. The letters indicated that each application was returned because the applicant filed in the geographic area of other pending MMDS applications. One hundred thirty-five reconsideration petitions were filed, on November 13, 1992 and July 27, 1993, for the 131 returned applications.[206]

135. These 131 applications propose a transmitter site that is within 50 miles or

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[205] Contrary to their assertions in the petitions for reconsideration, applicants specifically indicated in their applications that they were not requesting waivers.

[206] Reconsideration petitions were filed for Application File Nos. 51357-CM-P-92 through 51446-CM-P-92; 51448-CM-P-92 through 51487-CM-P-92; and 51575-CM-P-92. Duplicate petitions were submitted for the same application by the same attorney in several instances. No petition was filed for Application File No. 51447-CM-P-92, which specified the same transmitter site in Coshocton and was filed and returned on the same dates as the petitioned applications.

The Coshocton reconsideration petitions filed on November 13, 1992 for Application File Nos. 51575-CM-P-92 and 51477-CM-P-92 through 51487-CM-P-92 were timely. Those remaining petitions that were jointly filed on July 27, 1993, more than eight months after the date of the return letters, were untimely (Application File Nos. 51357-CM-P-92 through 51446-CM-P-92 and 51448-CM-P-92 through 51476-CM-P-92). The July petitioners argue that their petitions should be accepted because the Commission's failure to return the applications to the designated contact representative caused delays in filing the petitions. Attached to the petitions are two statements from MMDS applicants proposing to serve the San Diego, Texas area, which state that the Commission did not return their applications with the return notifications. These statements make no reference to Coshocton applicants and no representation is made that the Coshocton applicants failed to receive return notifications in a timely manner.

the radio horizon of: (1) five 1983 proposed MMDS stations, with applications pending on November 12, 1991, the filing date of the Coshocton applications;[207] and (2) 279 post-1983, previously proposed MMDS stations, with applications pending on November 12, 1991.[208] These applications failed to include interference studies, as required by § 21.902(b) and (c), for 283 previously proposed MMDS stations with applications pending. The interference study submitted with the applications was inadequate in that it failed to include free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the previously proposed stations, as required by § 21.902(c), (d) and (f). *See* § 21.902(e). In addition, the applicants failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, the Coshocton applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to previously proposed stations.

136. The Coshocton petitioners primarily assert that the returned applications contained all necessary elements, including the required interference analyses, for the granting of a waiver of the *1988 Public Notice* location restriction.[209] The Coshocton petitions contend that, because all required interference analyses were supplied and showed that no harmful interference would result from granting the applications, the Commission acted arbitrarily and capriciously in returning the applications without a "hard look" at the applicants' eligibility for a waiver and without a careful review of the applicants' showing. Petitioners argue that the Commission's reliance on the *1988 Public Notice* to return the Coshocton applications was misplaced, as that *Public Notice* established a mechanism for applicants to demonstrate non-interference. Finally, the petitioners allege that Coshocton would be denied reliable service if the returned applications are not reinstated, because of the distance from Coshocton to authorized or

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[207] Application File Nos. 08165-CM-P-83; 08200-CM-P-83; 05616-CM-P-83; 08763-CM-P-83; and 10623-CM-P-83.

[208] The proposed stations include two applications for Zanesville, Ohio (Application File Nos. 50531-CM-P-92 and 50532-CM-P-92), two applications for Centerville, Ohio (50806-CM-P-92 and 50807-CM-P-92), 105 applications for East Sparta, Ohio (including, but not limited to, Application File Nos. 51591-CM-P-91 through 51611-CM-P-91) and 170 applications for Canton, Ohio (including, but not limited to, Application File Nos. 50668-CM-P-91 through 53337-CM-P-91).

[209] The timely Coshocton petitions attempt to buttress this position by noting that the return notifications did not specifically cite the failure to comply with the requirements for a waiver as a reason for returning the applications. However, the Coshocton applications did not include a waiver request.

previously proposed MMDS stations.[210]

137. Defiance, Ohio. On July 19, 1991, certain petitioners filed two applications proposing the same transmitter site at Defiance, Ohio.[211] After reviewing the Defiance applications, the Commission staff returned each as defective and unacceptable for filing by return notification letters dated December 16, 1991. The letters indicated that each application was returned because the applicant filed in the geographic area of authorized MMDS applications. Petitions for reconsideration were filed for the returned applications on August 31, 1993.[212]

138. These applications propose a transmitter site that is within 50 miles or the radio horizon of four 1983 authorized MMDS stations[213]and 38 1983 proposed MMDS stations with applications pending on July 19, 1991, the filing date of the Defiance applications.[214] The applicants failed to submit free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the previously proposed or authorized stations as required by § 21.902(c), (d),

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[210] In addition, the untimely petitioners argue that the Commission failed: (1) to indicate which other applications were filed before the Coshocton applications for the same geographic area and that the applicants' *Ashbacker* rights were denied because they have been unable to challenge these prior filed applications; (2) to provide sufficient detail of the specific reasons for the return of the applications, contrary to the requirements of reasoned and articulated decision-making; and (3) to correctly apply the "so called 15/50 mile" restrictions *vis-a-vis* existing or proposed MMDS operations.

[211] Application File Nos. 60878-CM-P-91 and 60883-CM-P-91.

[212] The petitions were filed more than one year and six months after expiration of the period for filing of such petitions. The petitioners offer no explanation for their late filing. While petitioners refer to unidentified petitions for reconsideration which were "filed earlier" in these cases, no earlier petitions were ever filed with the Commission for these Defiance, Ohio applicants.

Reconsideration petitions were not filed for Applications File Nos. 60862-CM-P-91 through 60877-CM-P-91; 60879-CM-P-91 through 60882-CM-P-91; and 60884-CM-P-91 through 60907-CM-P-91, which also proposed a transmitter site at Defiance, Ohio, were filed on the same day as the petitioned applications, and were returned at the same time.

[213] WMH228 and WMH528 in Lima, Ohio, and WHT767 and WHT768 in Fort Wayne, Indiana.

[214] These 38 applications include 22 applications for Lima, Ohio, and 16 applications for Toledo, Ohio (including, but not limited, to Application File Nos. 11706-CM-P-83; 14223-CM-P-83; 12930-CM-P-83; 01512-CM-P-83; and 01163-CM-P-83. Application File Nos. 01512-CM-P-83 and 01163-CM-P-83 were subsequently granted (WHT742 and WHT741).

and (f) (1993). *See* § 21.902(e). These applicants also failed to comply with the requirements of § 21.901(d)(1) for ITFS interference protection because free space calculations were not submitted for each registered receive site of Station WHR798 (Kendallville, Indiana), an ITFS station with an authorized transmitter site within 50 miles of the proposed Defiance transmitter site. In addition, the applicants failed to satisfy the requirements for service of interference studies upon all previously proposed or authorized MMDS applicants, conditional licensees and licensees, as provided in § 21.902(g). Thus, the Defiance applicants failed to demonstrate that the station proposed would not cause harmful interference to the authorized or previously proposed stations. No waiver requests were included in the Defiance applications.

139. In filing their petitions, the Defiance applicants argue that the Commission: (1) insufficiently detailed its reasons for returning the applications; (2) violated the applicants' *Ashbacker* rights by failing to indicate which of the previously filed applications, if any, established any valid cut-off period; (3) failed to properly enunciate and/or premise its rules, policies, and reasons for return, citing *McElroy Electronics*; and (4) incorrectly applied the so-called 15/50 mile rules relating to existing or proposed MMDS stations. The applicants also claim that the applications were acceptable for filing and contained all necessary waiver requests. In support, the applicants maintain that their interference analysis demonstrated that there is no realistic possibility of harmful interference to any other existing or proposed station and that the Commission has previously granted MMDS applications despite potential interference when an applicant shows such potential interference problems have been resolved, citing *Austin Movie*. The applicants assert that the required interference studies were served upon the affected parties and that no objections were filed. Applicants finally contend that denial of their waiver requests by return notification letter does not meet the "hard look" requirement established in *WAIT Radio* and defeats the underlying purpose of interference study requirements.

140. Findlay, Ohio. On November 21, 1991, certain petitioners filed two applications proposing the same transmitter site at Findlay, Ohio.[215] After reviewing each of the Findlay applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated October 26, 1992. The letters indicated that each application was returned because the applicant filed in the geographic area of authorized MMDS stations. Also, the letters indicated that the applicants' waiver requests were denied due to failure to comply with § 21.19 requirements. Reconsideration petitions for the two returned applications were filed on November 25, 1992.

141. These two applications propose a transmitter site that is within 50 miles or

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[215] Application File Nos. 52023-CM-P-92 and 52026-CM-P-92.

the radio horizon of: (1) two 1983 authorized MMDS stations;[216] (2) 32 1983 proposed MMDS stations, with applications pending on November 21, 1991, the filing date of the Findlay applications;[217] and (3) 172 post-1983, previously proposed MMDS stations, with applications pending on November 21, 1991.[218] These applications failed to include interference studies, as required by § 21.902(b) and (c), for 152 previously proposed MMDS stations with applications pending. Moreover, the interference studies actually submitted with the applications were inadequate in that they failed to submit free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the previously proposed or authorized stations as required by § 21.902(c), (d) and (f). *See* § 21.902(e). These applicants also failed to comply with the requirements of § 21.901(d)(1) for ITFS interference protection because free space calculations were not submitted for each registered receive site for each ITFS licensee with an authorized transmitter site within 50 miles of the proposed Findlay transmitter site. In addition, the applicants failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, the Findlay applicants failed to demonstrate that the station proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

142. The Findlay petitioners primarily assert that the returned applications contained all the necessary elements for acceptance and for the grant of any needed waiver, including the required interference analyses.[219] These petitions contend that, because all required interference analyses were supplied, all service and filing requirements met, and proof of no harmful interference resulting from granting the applications offered, the Commission acted arbitrarily and capriciously in returning the applications without taking a "hard look" at the applicants' eligibility for a waiver and

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[216] WMH228 and WMH528 in Lima, Ohio.

[217] These 32 proposed stations include seven for Toledo, Ohio (Application File Nos. 16458-CM-P-83; 12930-CM-P-83; 07572-CM-P-83; 10177-CM-P-83; 08847-CM-P-83; 14223-CM-P-83; and 02400-CM-P-83) and 25 for Lima, Ohio (including, but not limited to, Application File Nos. 00590-CM-P-83; 12280-CM-P-83; 06674-CM-P-83; 0617-CM-P-83; and 15317-CM-P-83).

[218] These proposed stations include 46 for Defiance, Ohio (including, but not limited to 60900-CM-P-91 through 68907-CM-P-91) and 126 for Upper Sandusky, Ohio (the same 126 Upper Sandusky applications discussed at ¶¶ 143-145).

[219] Petitioners cite *Austin Movie* for the proposition that the Commission may grant applications despite potential interference when an applicant shows that the potential interference problems have been resolved. However, as noted above, the Findlay petitioners did not specifically request waivers in their applications.

without a careful review of the applicants' showing, as required by *WAIT Radio*.[220] Moreover, the petitioners maintain that the Commission's reliance on the *1988 Public Notice* to return the applications was misplaced because that *Public Notice* contained a mechanism (*i.e.*, interference studies) for applicants to demonstrate non-interference. Petitioners further argue that the distance between the proposed Findlay site and the other previously proposed or authorized stations hinders the ability of these stations to provide reliable service to the Findlay community. Petitioners state that the waiver request fully complied with Commission rules by showing the lack of a reasonable alternative site, and that without grant of the waiver, reliable service to the proposed service area would be effectively denied.

143. Upper Sandusky, Ohio. On November 18, 1991, certain petitioners filed 126 applications proposing the same transmitter site at Upper Sandusky, Ohio. After reviewing each of the 126 Upper Sandusky applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated October 23, 1992. The letters indicated that each application was returned because the applicant: (1) filed in the geographic area of other authorized MMDS stations and pending MMDS applications; and (2) filed a waiver request that failed to comply with § 21.19 requirements. One hundred thirty-three reconsideration petitions were filed for the 126 returned applications.[221]

144. These 126 applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) two 1983 authorized MMDS stations;[222] (2) 44 1983 proposed MMDS stations, with applications pending on the November 18, 1991, filing date of the Upper Sandusky applications;[223] and (3) one post-1983, previously proposed MMDS

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[220] Petitioners also cite *Lawrence N. Brandt* and *Marylan J. Benson* in support of their request for waiver of the 50 mile benchmark.

[221] Reconsideration petitions were filed on November 23, 1992 for Application File Nos. 51766-CM-P-92 through 51789-CM-P-92; 51800-CM-P-92 through 51814-CM-P-92; 51875-CM-P-92 through 51905-CM-P-92; 51911-CM-P-92 through 51953-CM-P-92; and 51955-CM-P-92 through 51967-CM-P-92. In some instances, the same attorney submitted multiple petitions for the same application. A subsequent joint petition was filed on August 31, 1993 for Application File Nos. 51951-CM-P-92; 51808-CM-P-92; 51887-CM-P-92; 51905-CM-P-92; and 51923-CM-P-92.

[222] The 1983 authorized stations are Application File Nos. 07141-CM-P-83 (WMH 228, Lima, Ohio) and 01431-CM-P-83 (WMH528, Lima, Ohio).

[223] These 44 proposed stations include 17 for Lima, Ohio, 26 for Mansfield, Ohio and one for Toledo, Ohio (including but not limited to Application File Nos. 06674-CM-P-83; 01617-CM-P-83; 10344-CM-P-83; 16340-CM-P-83 and 16458-CM-P-83). Application File No. 12015-CM-P-83 (WLK210) was granted subsequent to the filing of the Upper Sandusky applications.

station, with an application pending on November 18, 1991.[224] These 126 Upper Sandusky applications failed to include interference studies, as required by § 21.902(b) and (c), for 44 previously proposed MMDS stations with applications pending. Moreover, the interference studies submitted with the applications were inadequate because they failed to include free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the authorized or previously proposed stations as required by § 21.902(c), (d) and (f). *See* § 21.902(e). These applicants also failed to comply with the requirements of § 21.901(d)(1) for ITFS interference protection because free space calculations were not submitted for each registered receive site of Station WHR668 (Fremont, Ohio), an ITFS station with an authorized transmitter site within 50 miles of the proposed Upper Sandusky transmitter site. In addition, the applicants failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). [225] Thus, these 126 Upper Sandusky applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

145. The Upper Sandusky petitioners assert that the returned applications were acceptable for filing and contained all the necessary elements for the granting of a waiver of the Commission's 50 mile location restriction, including all required interference analyses.[226] Chiefly, the Upper Sandusky petitioners contend that the required interference analyses were served on the affected parties, who raised no objections, and demonstrated that no harmful interference would result from grant of

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[224] The post-1983, previously proposed station is Application File No. 59766-CM-P-91 (Mansfield, Ohio).

[225] The certificate of service signed by the engineer who prepared Exhibit E to the Upper Sandusky applications certifies that only three authorized ITFS stations and three authorized or previously proposed MMDS stations were served.

[226] The August 31, 1993 petition additionally alleges four grounds for reconsideration: (1) the Commission's insufficient detailing of the specific reasons for returning the applications; (2) the Commission's failure to indicate which applications, if any, established any valid cut-off period, thereby violating the applicants' *Ashbacker* rights; (3) the Commission's failure to properly enunciate and/or premise its rules, policies, and reasons for return, citing *McElroy Electronics*; and (4) the Commission's incorrect application of the 50-mile rule, the criteria for filing applications, and the *1988 Public Notice*. Petitioners also complain that they experienced delays in receiving the returned applications and the return notification letters, which thereby delayed the filing of the August 31, 1993 petition. Petitioners maintain that the untimely August 31, 1993 petition should be accepted due to the Commission's failure to return the defective applications to the designated "contact representative." As noted above, timely petitions for reconsideration were filed on behalf of each petitioner on November 23, 1992.

the applications. Petitioners further argue that the waiver request fully complied with Commission rules by showing the lack of a reasonable alternative site, and that without grant of the waiver, reliable service to the proposed service area would be effectively denied, given the distance of other MMDS stations from Upper Sandusky.[227] In addition, petitioners, citing *Austin Movie*, maintain that the Commission has previously granted an MDS application, notwithstanding possible interference to the signals within the protected service area of another facility, when the applicant's engineering analysis and agreement with potentially affected parties overcame the presumption of harmful interference. Petitioners further assert that the Commission acted arbitrarily and capriciously by returning the applications without a careful review of the applicants' showing and by denying their waiver request with a "hard look." Petitioners conclude that the Commission's failure to review the applications carefully results in the adoption of "more stringent separation standards *ex post facto*," and that denial of the waiver request defeats the underlying purpose of the interference analysis and *Public Notice* requirements.

146. Pendleton, Oregon. On September 23, 1991 and September 27, 1991, certain petitioners filed 85 applications proposing the same transmitter site at Pendleton, Oregon. After reviewing each of the Pendleton applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated June 30, August 6, September 17, or September 23, 1992. The letters indicated that each application was returned because the applicant filed in the geographic area of other pending MMDS applications. In addition, the return letters denied each applicant's request for a waiver due to failure to comply with § 21.19 requirements.[228] Eighty-six reconsideration petitions were filed on September 4, 1992, October 16, 1992, November 20, 1992, and August 31, 1993 for the 85 returned applications.[229]

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[227] Petitioners cite *Lawrence N. Brandt* and *Marylan J. Benson* as cases that confirm the Commission's policy permitting waiver of the 50-mile location restriction upon a showing of lack of harmful interference to cochannel or adjacent channel stations operating within 50 miles or the radio horizon of a proposed transmitter site, and to distinguish the instant waiver request from two that were denied for having failed to provide all of the requisite interference analyses.

[228] Despite a contention to the contrary in some of the Pendleton petitions, we note that the return notification letters to the Pendleton applicants did in fact indicate that the applicants' waiver requests failed to comply with § 21.19 requirements.

[229] Reconsideration petitions were filed for Application File Nos. 62268-CM-P-91 through 62306-CM-P-91; 62332-CM-P-91 through 62367-CM-P-91; 62369-CM-P-91 through 62371-CM-P-91; 62398-CM-P-91; 62402-CM-P-91; 62413-CM-P-91; 62419-CM-P-91; 62423-CM-P-91; 62425-CM-P-91; and 62479-CM-P-91. In one instance, multiple petitions were filed for the same application (Application File No. 62337-CM-P-91). No

147. These 85 applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) eleven 1983 proposed MMDS stations, with applications pending on September 23, 1991 and September 27, 1991, the filing dates of the Pendleton applications;[230] and (2) 83 post-1983, previously proposed MMDS stations, with applications pending on the filing dates of the Pendleton applications.[231] The applications which were filed September 23, 1991 failed to include interference studies, as required by § 21.902(b) and (c), for one authorized MMDS station and 92 previously proposed MMDS stations with applications pending.[232] The applicants who filed on September 23, 1991 failed, in the interference analyses submitted, to include free space calculations of the desired to undesired signal ratio to each reference receiving antenna

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petitions were filed for two Pendleton applications (Application File Nos. 62323-CM-P-91 and 62329-CM-P-91), which were filed on September 23, 1991 (the same day as all but six of the petitioned applications) and which proposed the same site as all the petitioned applications. The majority of the Pendleton petitions were timely filed. However, we note that five petitions for Application File Nos. 62419-CM-P-91; 62423-CM-P-91; 62425-CM-P-91; 62402-CM-P-91; and 62398-CM-P-91 were filed on August 31, 1993 (more than eleven months after the September 17, 1992 return notification letters), and one petition for Application File No. 62304-CM-P-91 was filed on September 4, 1992 (more than two months after the June 30, 1992 return notification), and thus, were untimely.

[230] Application File Nos. 04548-CM-P-83; 07130-CM-P-83; 11695-CM-P-83; 13589-CM-P-83; 15710-CM-P-83; 01651-CM-P-83; 10594-CM-P-83; 14027-CM-P-83; 00567-CM-P-83; 04147-CM-P-83 and 10895-CM-P-83, each proposing service to Richland, Washington. Application File No. 10895-CM-P-83 was subsequently granted (WML477).

[231] The proposed stations include two in Walla Walla, Washington, one in Richland, Washington and 80 in LaGrange, Oregon (including, but are not limited to, Application File Nos. 56447-CM-P-91; 56529-CM-P-91; 56560-CM-P-91; 56446-CM-P-91; 57569-CM-P-91; and 59414-CM-P-91).

[232] Six of the Pendleton applicants who filed petitions (Jonathan C. Sommers, File No. 62413-CM-P-91; Nicholas M. Boccio, File No. 62419-CM-P-91; Robert E. Shultz, Application File No. 62423-CM-P-91; Stanley N. Cichowski, Application File No. 62425-CM-P-91; Ronald J. Knisley, Application File No. 62402-CM-P-91; Paul A. Jarczyk, Application File No. 62398-CM-P-91), filed their applications on September 27, 1991, four days later than the other Pendleton applicants who filed petitions under consideration here. In addition to their failure to file and serve adequate interference studies, as specified above, these six Pendleton petitioners also failed to file any interference studies for 81stations proposed in the applications of the other previously filed Pendleton applicants and two MMDS stations proposed in Walla Walla, Washington, in applications filed in May, 1991, nearly four months prior to the filing of applications by these six Pendleton applicants.)

within the protected service area of the previously proposed or authorized stations, as required by § 21.902(c), (d) and (f). *See* § 21.902(e).[233] In addition, all the applicants failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, the Pendleton applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

148. The Pendleton petitioners primarily assert that the returned applications contained all necessary elements, including the required interference analyses, for the granting of a waiver of the *1988 Public Notice* location restriction. Petitioners contend that, because all required interference analyses were supplied and demonstrated that no harmful interference would result from granting the applications, the Commission acted arbitrarily and capriciously in returning the applications without a "hard look" at the applicants' eligibility for a waiver and without a careful review of the applicants' showing. Petitioners contend that the Commission's reliance on the *1988 Public Notice* to return the Pendleton applications was misplaced as the *Public Notice* established a mechanism for applicants to demonstrate non-interference.[234] Finally, petitioners note that Pendleton would be effectively denied reliable service from an MMDS station if the returned applications are not reinstated because of the distance from Pendleton to authorized or previously proposed MMDS stations and the lack of reasonable alternative sites which could provide reliable service to Pendleton.[235]

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[233] Although the six petitioners who filed later applications (Application File Nos. 62413-CM-P-91; 62419-CM-P-91; 62423-CM-P-91; 62425-CM-P-91; 62402-CM-P-91; 62398-CM-P-91) did submit several interference analyses, such interference studies were inadequate because these applicants: (1) failed to engineer the proposed station to provide 45 dB of cochannel interference protection and 0 dB of adjacent channel interference protection, pursuant to § 21.902(b)(3) and § 21.902(b)(4); (2) used incorrect technical parameters, such as the wrong transmitting antenna gain of the proposed station and the wrong transmitting antenna gain of the previously proposed stations with applications pending; (3) used incorrect methodology in calculating the protected service area of the previously proposed stations; (4) claimed terrain blockage, but failed to submit any demonstration thereof, such as shadow maps or terrain profiles; and (5) used a "typical" transmitting antenna type rather than the actual transmitting antenna type specified in the previously proposed station applications.

[234] In support, petitioners note that the Commission has granted MMDS applications despite potential interference when an applicant shows such potential interference problems have been resolved, citing *Austin Movie.*

[235] The untimely Pendleton reconsideration petitions filed August 31, 1993 additionally argue that: (1) even though no representation is made in the petitions that the Pendleton applicants failed to receive return notifications in a timely manner, the

149. Ridgeway, Pennsylvania. On December 6, 1991, certain petitioners filed three applications proposing the same transmitter site at Ridgeway, Pennsylvania.[236] After reviewing these applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated January 29, 1993. The letters indicated that each application was returned because the applicant filed in the geographic area of an authorized MMDS station or pending application. Reconsideration petitions were filed for the three returned applications on April 5, 1993 and August 31, 1993.[237]

150. These three applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) two 1983 proposed MMDS stations, with applications pending on December 6, 1991, the filing date of the Ridgeway applications;[238] and (2) 13 post-1983, previously proposed MMDS stations, with applications pending on December 6, 1991.[239] These applicants failed to submit interference studies for any of the proposed stations, as required by § 21.902(b) and (c), or to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, the Ridgeway applicants failed to demonstrate that the station proposed in the returned applications would not cause

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petitions, should be accepted because the Commission's failure to return the applications to the designated "contact representative" caused delays in filing the petitions; (2) the Commission failed to indicate which other applications were filed before the Pendleton applications for the same geographic area and that the applicants' *Ashbacker* rights were denied because they have been unable to challenge these prior-filed applications; (3) the Commission failed to provide sufficient detail of the specific reasons for the return of the applications, and is contrary to the requirements of reasoned and articulated decision making; and (4) the Commission incorrectly applied the 50-mile rule *vis-a-vis* existing or proposed MMDS operations.

[236] Application File Nos. 52238-CM-P-92; 52239-CM-P-92; and 52260-CM-P-92.

[237] These petitions were filed over two months and seven months from the date of the return letters and thus, were untimely. While petitioners refer to an unidentified petition for reconsideration "filed earlier," no earlier petition was received by the Commission. Petitioners also complain that the Commission bypassed the contact representative specified in the applications, thereby "creating the possibility of insufficient notice of its actions," citing *McElroy Electronics*, and that some unidentified MMDS applicants experienced delays in receiving the return notification letters or their applications. Petitioners, however, offered no proof that they experienced any delays in receiving their return letters.

[238] Application File Nos. 06723-CM-P-83 and 01664-CM-P-83 (State College, Pennsylvania). Application File No. 06723-CM-P-83 has since been granted (WMI366).

[239] Application File Nos. 51304-CM-P-92 through 51314-CM-P-92; 52193-CM-P-92; and 52194-CM-P-92.

harmful interference to previously proposed stations.

151. The Ridgeway petitioners primarily assert that the returned applications contained all the necessary elements, including the required interference analyses, for the granting of a waiver of the location restrictions in the *1988 Public Notice*.[240] Petitioners contend that because the required interference analyses submitted with the applications indicated that there was no realistic possibility of harmful interference to any existing or proposed stations, the Commission acted arbitrarily and capriciously in returning the applications without taking a "hard look" at the applicants' eligibility for a waiver and without a careful review of the applicants' showing, as required by *WAIT Radio*.[241] Petitioners further argue that other previously proposed or authorized stations cannot provide reliable service to Ridgeway because of their distance from the community, and that their waiver request fully complied with Commission rules by showing the lack of a reasonable alternative site. Petitioners conclude that granting their waiver request would effectuate the underlying purpose of the *1988 Public Notice* location restriction, which they claim is solely to avoid harmful interference, and result in reliable service to Ridgeway.[242]

152. Hampton, South Carolina. On November 12, 1991, certain petitioners filed 84 applications proposing the same transmitter site at Hampton, South Carolina. After reviewing each of the Hampton applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated

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[240] The applications, however, did not include a waiver request. Petitioners also neglected to attach the "further Engineering Statement" referenced in the petition, which promised to discuss the "more than adequate steps" taken by the applicants to avoid interference and to demonstrate that no reasonable alternative transmitter site exists.

[241] Petitioners cite *Austin Movie* for the proposition that the Commission may grant applications despite potential interference when an applicant shows that the potential interference problems have been resolved, as petitioners claim to have done here. The petitioner for Application File No. 52238-CM-P-92 also argues that his application should not be returned for failure to comply with the *1988 Public Notice* because the *Notice* specifically contemplates the granting of waivers of the location restrictions where the applicant demonstrates non-interference, and cites *Lawrence Brandt* as confirming that such a waiver is possible under current Commission policy.

[242] The August petitioners contend that return of their applications was inappropriate because the Commission: (1) insufficiently detailed of the specific reasons for such returns; (2) failed to indicate which applications establish any valid cut-off period, thus denying applicants' *Ashbacker* rights; (3) failed to properly enunciate its rules and reasons for return of the applications; and (4) incorrectly applied of the "so-called 50 mile rule."

October 14, 1992. The letters indicated that each application was returned because the applicant filed in the geographic area of other pending MMDS applications. Eighty-five reconsideration petitions were filed on November 13, 1992, for the 84 returned applications.[243]

153. These 84 applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) one 1983 authorized MMDS station;[244] (2) five 1983 proposed MMDS stations with applications pending on November 12, 1991, the filing date of the Hampton applications;[245] and (3) 98 post-1983, previously proposed MMDS stations, with applications pending on November 12, 1991.[246] These applications failed to include interference studies, as required by § 21.902(b) and (c), for 103 previously proposed MMDS stations with applications pending. Moreover, the interference studies submitted with the applications were inadequate because they failed to submit free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the authorized or previously proposed stations as required by § 21.902 (c), (d), and (f). *See* § 21.902(e). These applicants also failed to comply with the requirements of § 21.901(d)(1) for ITFS interference protection because free space calculations were not submitted for each registered receive site of three ITFS licensees with an authorized transmitter site within 50 miles of the proposed Hampton transmitter site.[247] In addition, the applicants failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, the Hampton applicants failed to demonstrate that the station proposed in the returned application would not cause harmful interference to authorized or previously proposed stations.

154. The Hampton petitioners primarily assert that the returned applications contained all the necessary elements, including the required interference analyses, for

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[243] Petitions were filed for Application File Nos. 51589-CM-P-92 through 51659-CM-P-92; 51670-CM-P-92 through 51681-CM-P-92; and 51683-CM-P-92. In one instance, the same attorney submitted a duplicate petition for the same application (51672-CM-P-92).

[244] WHT592 in Orangeburg, South Carolina.

[245] Application File Nos. 13164-CM-P-83; 11259-CM-P-83; 05527-CM-P-83; 16539-CM-P-83; and 15568-CM-P-83 in Savannah, Georgia.

[246] These 98 applications propose a transmitter site in Hilton Head, South Carolina (including, but not limited to, Application File Nos. 55374-CM-P-91; 52643-CM-P-91; 52919-CM-P-91; and 52780-CM-P-91).

[247] Stations WHN713 (Ridgeland, South Carolina), WHR473 (Barnell, South Carolina) and WKX222 (Summerville, South Carolina).

acceptance of the applications and the grant of any needed waivers.[248] Petitioners contend that because all required interference analyses were supplied and served, and showed that no harmful interference would result from granting the applications,[249] the Commission acted arbitrarily and capriciously in returning the applications without a "hard look" at the applicants' eligibility for a waiver and without a careful review of the applicants' showing. In addition, petitioners, citing *Austin Movie*, maintain that the Commission has previously granted an MDS application, notwithstanding possible interference to the signals within the protected service area of another facility, when the applicant's engineering analysis and agreement with potentially affected parties overcame the presumption of harmful interference. Petitioners further assert that other proposed or existing MMDS stations could not serve the Hampton community on a reliable basis. Petitioners accordingly conclude that the Commission's failure to review the applications carefully results in the adoption of "more stringent separation standards *ex post facto*," and that the denial of waiver request defeats the underlying purpose of the interference analysis and *1988 Public Notice* requirements.

155. Oneida, Tennessee. On February 18, 1992, certain petitioners filed 104 applications proposing the same transmitter site at Oneida, Tennessee. After reviewing each of the Oneida applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated April 25, 1994. The letters indicated that each application was returned because the applicant: (1) filed in the geographic area of authorized and pending MMDS applications; (2) failed to supply and serve the required interference analysis pursuant to § 21.902; and (3) failed to consider all previously proposed or authorized ITFS or MMDS stations pursuant to § 21.902(f)(1) and (f)(2). With regard to the applicants' waiver request, the letters indicated that the applicants failed to request waiver of the *1988 Public Notice* location restrictions, failed to demonstrate that enforcement of the requirement to demonstrate non-interference and serve a copy of the analysis on the affected parties would be unduly burdensome, and failed to show a lack of reasonable alternatives. Reconsideration petitions were filed on May 25, 1994 for the 104 returned applications.[250]

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[248] The petitions attempt to buttress this position by noting that the return notifications letters did not specifically cite the failure to comply with the requirements for a waiver as a reason for returning the applications.

[249] Petitioners cite *Lawrence N. Brandt* and *Marylan J. Benson* as cases that confirm the Commission's policy permitting waiver of the 50-mile location restrictions upon a showing of lack of harmful interference to cochannel or adjacent channel stations operating within 50 miles or the radio horizon of a proposed transmitter site, and to distinguish the instant waiver request.

[250] Reconsideration petitions were filed for Application File Nos. 01869-CM-P-92; 01886-CM-P-92; 01909-CM-P-92 through 01916-CM-P-92; 01939-CM-P-92 through

156. These applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) one 1983 authorized MMDS station;[251] (2) one post-1983 authorized station;[252] (3) one 1983 previously proposed station, with an application pending on February 18, 1992, the filing date of the Oneida applications;[253] and (4) 158 post-1983, previously proposed MMDS stations, with applications pending on February 18, 1992.[254] These applications failed to include interference studies, as required by § 21.902(b) and (c), for two authorized MMDS stations and 156 previously proposed MMDS stations with applications pending, and to satisfy the requirements for service of interference studies stipulated by § 21.902(g). In addition, the interference analyses that were submitted with the applications were inadequate in that they failed to submit free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the previously proposed or authorized stations as required by § 21.902(c), (d) and (f). These applicants also failed to comply with the requirements of § 21.901(d)(1) for ITFS interference protection because free space calculations were not submitted for each registered receive site of each ITFS licensee with an authorized transmitter site within 50 miles of the proposed MMDS station's proposed transmitter site.[255] Thus, the Oneida applicants failed to demonstrate that the station proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations. [256]

01953-CM-P-92; 01955-CM-P-92 through 01959-CM-P-92; 01964-CM-P-92 through 01965-CM-P-92; 01972-CM-P-92 through 01981-CM-P-92; 01989-CM-P-92 through 01995-CM-P-92; 02016-CM-P-92 through 02025-CM-P-92; 02027-CM-P-92 through 02030-CM-P-92; 02033-CM-P-92 through 02036-CM-P-92; 02047-CM-P-92; 02083-CM-P-92 through 02086-CM-P-92; 02100-CM-P-92 through 02123-CM-P-92; 02130-CM-P-92; 02144-CM-P-92; 02155-CM-P-92 through 02160-CM-P-92; 02174-CM-P-92 through 02175-CM-P-92. On June 1, 1994, a supplement was filed to include an engineering statement and certificate of service for each application.

[251] Application File No. 02583-CM-P-83 (WHT720 in Knoxville, Tennessee).

[252] Application File No. 50139-CM-P-89 (WLW953 in Knoxville, Tennessee).

[253] Application File No. 16642-CM-P-83 (Knoxville, Tennessee).

[254] These previously proposed stations include 22 applications for Somerset, Kentucky and 136 applications for Crossville, Tennessee (including, but not limited to, Application File Nos. 53733-CM-P-91; 54876-CM-P-91; and 51372-CM-P-91.) Application File No. 53733-CM-P-91 was subsequently granted (WLR488 in Somerset, Kentucky).

[255] Stations WLX224 and WHR732 at Knoxville, Tennessee.

[256] While the Oneida applications stated that the proposal was not inconsistent with any Commission rules and did not require a waiver, an exhibit to the application did request a waiver of the interference analysis and service requirements of §§ 21.902(g)

157. The Oneida petitioners primarily assert that the returned applications were acceptable for filing and contained all elements needed for a waiver, including the required interference analyses. Petitioners contend that, because all required interference analyses were supplied, all service and filing requirements met, and proof of no harmful interference resulting from granting the applications offered, the Commission acted arbitrarily and capriciously in returning the applications without a "hard look" at the applicants' eligibility for a waiver and without a careful review of the applicants' showing, as required by *WAIT Radio*.[257] Petitions further argue that the distance between the proposed Oneida site and the other previously proposed or authorized stations prohibits these stations from providing reliable service to Oneida, and that there were no reasonable alternatives sites from which to provide reliable service on a non-interference basis. Further, petitioners argue that a waiver should have been granted of Commission rules regarding interference analysis and service requirements, relative to lottery losers, because such an exercise is "wasteful and virtually meaningless."

158. Paris, Tennessee. On October 7, 1991, certain petitioners filed 131 applications proposing the same transmitter site at Paris, Tennessee. After reviewing these 131 applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated November 10, 1992. The letters indicated that each application was returned because the applicant filed in the geographic area of other pending MMDS applications. With regard to the applicants' request for a waiver of the 50-mile location restriction in the *1988 Public Notice*, the return letters indicated that the applications failed to meet the waiver requirements in § 21.19, and that without a waiver, the applications were unacceptable for filing. Reconsideration petitions were filed for these 131 returned applications on July 23, 1993.[258]

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and (c) relative to lottery losing applications.

[257] Petitioners further assert that they have committed to make every effort to avoid harmful interference to others and to cooperate in good faith should any interference occur in the future, and cite *Austin Movie* for the proposition that the Commission may grant applications despite potential interference when an applicant shows that the potential interference problems have been resolved.

[258] The Paris applicants jointly filed two petitions, one seeking reconsideration for 66 returned applications for the F channel group (Application File Nos. 50296-CM-P-92 through 50361-CM-P-92), and the other seeking reconsideration for 65 returned applications for the E channel group (Application File Nos. 50362-CM-P-92 through 50394-CM-P-92 and 50396-CM-P-92 through 50427-CM-P-92). The Paris petitions did not include Application File No. 50395-CM-P-92, which specified the same transmitter site at Paris, and was filed and returned on the same date as the petitioned applications.

These reconsideration petitions were filed more than eight months after the date

159. These 131 applications propose a transmitter site that is within 50 miles or the radio horizon of one 1983 authorized MMDS station[259] and seven post-1983, previously proposed MMDS stations, with applications pending on October 7, 1991, the filing date of the Paris applications.[260] These 131 Paris applications failed to include interference studies, as required by § 21.902(b) and (c), for six previously proposed MMDS stations with applications pending.[261] In addition, the interference studies submitted with the applications were inadequate in that they failed to submit free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the previously proposed or authorized stations as required by § 21.902(c), (d) and (f). *See* § 21.902(e). The applicants also failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, these 131 applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

160. The Paris petitioners assert that the Commission erred in returning the Paris applications for the following reasons which were listed, without discussion, in the untimely petitions: (1) insufficient detailing of the specific reasons for such returns;

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of the return notification letters sent to the Paris applicants and thus, are untimely. While petitioners refer to an unidentified petition for reconsideration "filed earlier" no earlier petition was received for any of the Paris applications. Petitioners also complain that MMDS applicants in some markets experienced delays in receiving return notification letters, and imply that their Paris filing was somehow delayed because the Commission did not mail a copy of each return letter to the contact representative listed in the applications. However, petitioners offered no evidence that they experienced any delay whatsoever in receiving the return notification letters relating to the Paris applications.

[259] WGW628 at Union City, Tennessee.

[260] These include two applications for Murray, Kentucky (Application File Nos. 50001-CM-P-91 and 50002-CM-P-91), two applications for Camden, Tennessee (Application File Nos. 61266-CM-P-91 and 61269-CM-P-91), two applications for Jackson, Tennessee (Application File Nos. 559858-CM-P-91 and 55967-CM-P-91) , and one application for Union City, Tennessee (Application File No. 50531-CM-P-90). Application File No. 50531-CM-P-90 was subsequently granted (WMI844).

[261] Application File Nos. 55967-CM-P-91 and 55958-CM-P-91 (Jackson, Tennessee), 61269-CM-P-91 and 61266-CM-P-91 (Camden, Tennessee), and 50001-CM-P-92 and 50002-CM-P-92 (Murray, Kentucky). The Camden and Murray proposed transmitter sites are located only 20.34 and 18.65 miles, respectively, from the transmitter site proposed in the Paris applications. The Murray applications were placed on public notice on July 1, 1992, over four months before the Paris applications were returned.

(2) no indication of which applications establish any valid cut-off period, thus denying applicants' *Ashbacker* rights; (3) failure to properly enunciate the Commission's rules and reasons for return, in violation of statute, citing *McElroy Electronics*; and (4) incorrect application of the 50 mile location restrictions. Petitioners also assert that the Paris applications were acceptable for filing and contained all necessary waiver requests. In support, petitioners maintain that their interference analyses demonstrated that there is no realistic possibility of harmful interference to any other existing or proposed station and that the Commission has previously granted MMDS applications, despite potential interference when an applicant shows such potential interference problems have been resolved, citing *Austin Movie*. Petitioners further complain that denial of their waiver request by return notification letter does not constitute the required "hard look" and that their waiver request should be granted because it would result in service to Paris and effectuate the underlying purpose of the pertinent rules.

161. Center, Texas. On August 15, 1991, certain petitioners filed 90 applications proposing the same transmitter site at Center, Texas. After reviewing each of the Center applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated March 3, 1993. The letters indicated that each application was returned because the applicant: (1) filed in the geographic area of an authorized MMDS station or pending MMDS application; and (2) provided inadequate interference analyses under § 21.902 due to failure to serve all affected parties pursuant to § 21.902(g) and/or failure to consider all previously proposed or authorized ITFS or MMDS stations pursuant to § 21.902(c) and/or § 21.902(i). Ninety-three reconsideration petitions were filed on April 2, 1993, and/or July 28, 1993, for the returned MMDS applications.[262]

162. These 90 applications propose a transmitter site that is within 50 miles or the radio horizon of seven 1983 proposed MMDS stations, with applications pending on August 15, 1991, the filing date of the Center applications.[263] These applications failed

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[262] Reconsideration petitions were filed for Application File Nos. 61315-CM-P-91 through 61404-CM-P-91. A timely petition for reconsideration was filed on April 2, 1993 for Application File Nos. 61322-CM-P-91; 61374-CM-P-91; and 61389-CM-P-91. A second petition was filed for Application File Nos. 61322-CM-P-91; 61374-CM-P-91 and 61389-CM-P-91 and for the other applicants on July 28, 1993. The July 28, 1993 petitions were filed over four months after the date of the return letters sent to the applicants and thus, are untimely. Petitioners complain that there was a delay in receipt of the return letters by the contact representative and argue that the untimely petitions should be accepted due to the Commission's failure to return applications to the designated contact representative.

[263] These applications include six filed for Lufkin, Texas (Application File Nos. 01306-CM-P-83; 16042-CM-P-83; 00630-CM-P-83; 15859-CM-P-83; 02535-CM-P-83; and 01283-CM-P-83) and one for Longview, Texas (09137-CM-P-83). Application File Nos.

to include interference studies, as required by § 21.902(b) and (c), for five previously proposed MMDS stations. The interference studies submitted with the applications were inadequate in that they failed to include free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service areas of the authorized or previously proposed stations as required by § 21.902(c), (d) and (f). *See* § 21.902(e). In addition, the applicants failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, the Center applicants failed to demonstrate that the station proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

163. The April petitioners assert that the Center applications were acceptable for filing and contained all elements necessary for any waivers. In support, petitioners maintain that they submitted interference studies and served all known existing or proposed stations within 50 miles, and that if additional stations do exist, petitioners should not be penalized if it is impossible to identify these other filings from the Commission's data base.[264] Petitioners further assert that their interference analyses demonstrated that there is no realistic possibility of harmful interference to any other existing or proposed station, that they have committed to make every effort to avoid harmful interference to others and to cooperate in good faith should any interference occur in the future.[265] Petitioners contend that, because all required interference analyses were supplied and showed that no harmful interference would result from granting the application, the Commission acted arbitrarily and capriciously in returning the applications without a "hard look."[266] Petitioners also argue that the Commission's decision to return the Center applications for alleged non-compliance with the *1988 Public Notice* is similarly misplaced, because the *Public Notice* specifically contemplates the granting of waivers of the 50 mile restriction where the applicant has demonstrated non-interference, as petitioners claim they have done here.[267] Petitioners also assert that

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16042-CM-P-83 (WMI807) and 1283-CM-P-83 (WMH993) have since been granted.

[264] We note that the five pending applications not considered by the petitioners had public notice dates of July 28, 1986, February 15, 1987, February 24, 1987, March 15, 1987 or March 25, 1987, all over four years before the Center applications were filed.

[265] Petitioners cite *Austin Movie* for the proposition that the Commission may grant applications despite potential interference when an applicant show that potential interference problems have been resolved.

[266] Petitioners also contend that returning their applications for allegedly failing to file the required interference studies is disingenuous in light of the fact that the Commission waived the requirements of § 21.902(c)(2) for applicants at the time of filing, citing *Donald E. Benson.*

[267] Petitioners also cite *Lawrence N. Brandt* and *Marylan J. Benson* as cases that confirm the Commission's policy of permitting waiver of the 50 mile location restrictions

reliable service to Center would be effectively denied if the Commission's decision is allowed to stand, and that a grant of their waiver request would effectuate the underlying purpose of the pertinent rules, which petitioners claim is the avoidance of harmful interference.

164. Crockett, Texas. On February 3, 1992, certain petitioners filed 60 applications proposing the same transmitter site at Crockett, Texas. After reviewing these 60 Crockett applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated February 18, 1993. The letters indicated that each application was returned because the applicant submitted an inadequate interference analysis due to failure to consider all previously proposed or authorized ITFS or MMDS stations and to serve all affected parties. Sixty one reconsideration petitions were filed for these 60 returned MMDS applications on several dates.[268]

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upon a showing of lack of harmful interference to co channel or adjacent channel stations operating within 50 miles or the radio horizon of a transmitter site, and to distinguish the instant waiver request from two that were denied for having failed to provide all of the requisite interference analyses. Petitioners further contend that the Commission's summary return of the Center applications, which they maintain demonstrate no harmful interference to any other existing or proposed stations, is procedurally unfair, arbitrary and capricious, and adopts more stringent separation standards *ex post facto*.

[268] Individual reconsideration petitions were timely filed on March 22, 1993 for 30 of the 60 Crockett applications (Application File Nos. 01232-CM-P-92; 01237-CM-P-92; 01240-CM-P-92; 01241-CM-P-92; 01245-CM-P-92; 01247-CM-P-92; 01249-CM-P-92; 01255-CM-P-92; 01257-CM-P-92; 01260-CM-P-92; 01261-CM-P-92; 01263-CM-P-92; 01264-CM-P-92; 01266-CM-P-92 through 01269-CM-P-92; 01272-CM-P-92 through 01280-CM-P-92; 01283-CM-P-92; 01287-CM-P-92; 01292-CM-P-92; and 01293-CM-P-92). A second reconsideration petition was filed on July 27, 1993 for Application File No. 1280-CM-P-92 and for 13 other applicants for the E channel (Application File Nos. 01233-CM-P-92 through 01235-CM-P-92; 01258-CM-P-92; 01262-CM-P-92; 01281-CM-P-92; 01282-CM-P-92; 01284-CM-P-92 through 01286-CM-P-92; and 01289-CM-P-92 through 01291-CM-P-92). On the same date fifteen applicants for the F channel also filed a joint petition (Application File Nos. 01236-CM-P-92; 01238-CM-P-92; 01239-CM-P-92; 01242-CM-P-92; 01246-CM-P-92; 01248-CM-P-92; 01250-CM-P-92 through 01254-CM-P-92; 01256-CM-P-92; 01259-CM-P-92; 01270-CM-P-92; and 01271-CM-P-92). The caption of the July petitions lists several applications twice. On August 31, 1993, a reconsideration petition was filed for Application File Nos. 01288-CM-P-92 and 01265-CM-P-92.

The July and August petitions were filed five to six months after the date of the return letters sent to the applicants and thus, are untimely. To justify their late filing, petitioners complain that MMDS applicants in some markets have experienced delays in

165. These 60 applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) two 1983 authorized MMDS stations for Bryan, Texas;[269] (2) five 1983 proposed MMDS stations, with applications pending on February 3, 1992, the filing date of the Crockett applications;[270] and (3) 136 post-1983, previously proposed MMDS stations, with applications pending on February 3, 1992.[271] These 60 applications failed to include interference studies, as required by § 21.902(b) and (c), for two authorized MMDS stations and 40 previously proposed MMDS stations with applications pending. In addition, the interference studies submitted with the applications were inadequate in that they failed to submit free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the previously proposed or authorized stations as required by § 21.902(c), (d) and (f). *See* § 21.902(e). The applicants also failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, these 60 applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

166. On reconsideration, petitioners assert that the Crockett applications were acceptable for filing and contained all necessary waiver requests. In support, petitioners maintain that they filed interference studies and served all known existing or proposed MMDS and ITFS stations within 50 miles, and that if additional stations do exist, petitioners should not be penalized if it is impossible to identify these other filings from

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receiving return notification letters, and imply that their Crockett filing was somehow delayed because the Commission did not mail a copy of each return letter to the contact representative listed in the applications. Petitioners offered no evidence that they experienced any delay in receiving the return notification letters relating to the Crockett applications.

[269] These are Stations WLW978 and WLW979. The applications for these Bryan stations were placed on public notice in September 1986, and granted on October 5, 1989, more than two years before the Crockett applications were filed.

[270] Application File No. 01283-CM-P-83 (Lufkin, Texas) has since been granted.

[271] These included two applications for Shepperd, Texas (Application File Nos. 51295-CM-P-92 and 51296-CM-P-92), two for Huntsville, Texas (60082-CM-P-91 and 60083-CM-P-91), and an additional 132 applications for Huntsville, 129 of which are discussed *infra*. The Crockett applications and these 132 Huntsville applications both specify Arthur L. Dalton, of MicroMedia Development Services, Inc., as the contact representative. Mirza M. Ahmad prepared the engineering information contained in both sets of applications.

the Commission's data base.[272] Petitioners further assert that because their interference analyses demonstrated that there is no realistic possibility of harmful interference to any other existing or proposed station, and they have committed to make every effort to avoid harmful interference to others and to cooperate in good faith should any interference occur in the future, the denial of their waiver request is arbitrary and capricious.[273] Petitioners also argue that the Crockett applications cannot be returned for failure to comply with the *1988 Public Notice*, because the *Public Notice* specifically contemplates the granting of waivers of the 50 mile restriction where the applicant has demonstrated non-interference, as petitioners claim to have done here. [274] Petitioners also assert that reliable service to Crockett would be denied if the Commission's decision is allowed to stand, and that a grant of their waiver request would effectuate the underlying purpose of the pertinent rules.

167. Huntsville, Texas. On August 20, 1991, certain petitioners filed 129 applications proposing the same transmitter site at Huntsville, Texas. After reviewing these 129 applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated March 3, 1993. The letters indicated that each application was returned because the applicant: (1) filed in the geographic area of authorized MMDS stations or pending MMDS applications; and (2) failed to consider all previously proposed or authorized ITFS or MMDS stations and to serve all affected parties pursuant to § 21.902(g). Reconsideration petitions were filed on April 2, 1993 and August 10, 1993 for these returned applications.[275]

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[272] Petitioners also complain that returning their applications for failing to file the required interference studies is disingenuous in light of the fact that the Commission has, in the past, waived the requirements of § 21.902(c)(2) for applicants at the time of filing, citing *Donald E. Benson.*

[273] Petitioners cite *Austin Movie* for the proposition that the Commission may grant applications despite potential interference when an applicant shows that the potential interference problems have been resolved.

[274] Petitioners also cite *Lawrence N. Brandt*, *Marylan J. Benson*, and *Donald E. Benson* in support of their request for waiver of the 50 mile location restriction. Petitioners further contend that the Commission's summary return of the Crockett applications, which demonstrate no harmful interference to any other existing or proposed stations, is procedurally unfair, arbitrary and capricious, and adopts more stringent separation standards *ex post facto.*

[275] Individual reconsideration petitions were timely filed on April 2, 1993 for 16 of the 129 Huntsville applications (Application File Nos. 61420-CM-P-91; 61434-CM-P-91; 61438-CM-P-91; 61452-CM-P-91; 61469-CM-P-91; 61470-CM-P-91; 61472-CM-P-91; 61476-CM-P-91; 61492-CM-P-91; 61500-CM-P-91; 61509-CM-P-91; 61521-CM-P-91; 61529-CM-P-91; 61532-CM-P-91; 61538-CM-P-91; and 61550-CM-P-91). In August, 1993, the remaining Huntsville applicants seeking reconsideration jointly filed two

168. These 129 applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) two 1983 authorized MMDS stations at Bryan, Texas;[276] (2) two 1983 proposed MMDS stations, with applications pending on August 20, 1991, the filing date of the 129 Huntsville applications;[277] and (3) four post-1983, previously proposed MMDS stations for Huntsville, Texas, with applications pending on August 20, 1991.[278] These 129 applications failed to include interference studies, as required by § 21.902(b) and (c), for any of the authorized or previously proposed stations[279] and also

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petitions, one for 56 returned applications for the F channel, and the other for 57 returned applications for the E channel (Application File Nos. 61418-CM-P-91; 61421-CM-P-91 through 61424-CM-P-91; 61426-CM-P-91 through 61433-CM-P-91; 61435-CM-P-91 through 61437-CM-P-91; 61439-CM-P-91 through 61441-CM-P-91; 61443-CM-P-91 through 61451-CM-P-91; 61453-CM-P-91 through 61468-CM-P-91; 61471-CM-P-91; 61473-CM-P-91 through 61475-CM-P-91; 61477-CM-P-91 through 61491-CM-P-91; 61493-CM-P-91 through 61499-CM-P-91; 61501-CM-P-91 through 61503-CM-P-91; 61505-CM-P-91 through 61508-CM-P-91; 61510-CM-P-91 through 61520-CM-P-91; 61522-CM-P-91 through 61528-CM-P-91; 61530-CM-P-91; 61531-CM-P-91; 61533-CM-P-91 through 61537-CM-P-91; 61539-CM-P-91 through 61547-CM-P-91; 61549-CM-P-91; and 61551-CM-P-91). The Huntsville petitions did not include Application File Nos. 61504-CM-P-91; 61442-CM-P-91 and 61548-CM-P-91, which specified the same transmitter site at Huntsville and were filed and returned on the same dates as the petitioned applicants.

These August petitions were filed more than five months after the return notification letters were sent to the Huntsville applicants and thus, are untimely. In order to justify their late filing, petitioners complain that MMDS applicants in some markets experienced delays in receiving return notification letters, attaching letters from two San Diego, Texas applicants alleging that the correct applications were not attached to the return notification letters these San Diego applicants received in a timely fashion, and imply that their Huntsville filing was somehow delayed because the Commission did not mail a copy of each return letter to the contact representative listed in the applications. Petitioners offered no evidence that they experienced any delay in receiving the return notification letters relating to the Huntsville applications.

[276] WLW978 and WLW979.

[277] Application File Nos. 02980-CM-P-83 and 16648-CM-P-83.

[278] Application File Nos. 60082-CM-P-91; 60083-CM-P-91; 60460-CM-P-91; and 60461-CM-P-91.

[279] The eight April petitioners for the E channel claim that the returned applications "had a detailed engineering statement/interference analysis (Exhibit E), which was certified as having been served on the only other existing or proposed stations within 50 miles of the above proposed station, those being located between 34 and 48.5 miles from the proposed site." The referenced Exhibit E attached to the applications states,

failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, these 129 applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

169. The timely Huntsville petitioners state that the returned applications contained all the necessary elements for acceptance and for the grant of any necessary waivers, including the required interference analysis.[280] Petitioners argue that the Commission's reliance on the *1988 Pubic Notice* to dismiss the Huntsville applications was misplaced, as the *Notice* provides a mechanism for applicants to demonstrate non-interference. Petitioners contend that, because they demonstrated non-interference, the denial of their waiver request was arbitrary and capricious. Petitioners further assert that the Commission's decision to return the Huntsville applications effectively denied reliable MMDS service to Huntsville.[281]

170. Jasper, Texas. On September 12, 1991, certain petitioners filed 20 applications proposing the same transmitter site at Jasper, Texas. After reviewing each of these 20 applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated July 7, 1993. The letters indicated that each application was returned because the applicant submitted an inadequate interference analysis due to their failure to serve all affected parties pursuant to § 21.902(g) and/or failure to consider all previously proposed or authorized ITFS or MMDS stations pursuant to § 21.902(c) and/or § 21.902(i). Reconsideration petitions were filed on August 6 or August 31, 1993 for the 20 returned applications.[282]

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however, that "[t]here are no existing or proposed co-channel [or adjacent channel] stations on file at the FCC within a 50 mile radius of the proposed transmitter site." Nor do the applications certify that an interference analysis was served on any existing or proposed station. The eight April petitioners for the F channel correctly point out that Exhibit E identified no existing or proposed stations within 50 miles.

[280] However, none of the Huntsville applications contained a waiver request.

[281] The untimely petitioners also argue that: (1) the Commission gave insufficient detail and failed to enunciate its reasons for returning the Huntsville applications, thereby violating principles of reasoned and articulated decision-making; (2) the applicants' *Ashbacker* rights were violated because they have not been able to challenge prior filed applications, if any; and (3) the Commission incorrectly applied the *1988 Public Notice* location restrictions *vis-a-vis* existing or proposed MMDS stations.

[282] The Jasper applicants jointly filed three petitions. Two petitions were filed on August 6, 1993 for 16 returned applications (Application File Nos. 61909-CM-P-91; 61910-CM-P-91; 61913-CM-P-91; 61924-CM-P-91; 61934-CM-P-91; 61935-CM-P-91; 61940-CM-P-91; 61952-CM-P-91; 61962-CM-P-91; 61968-CM-P-91; 61971-CM-P-91; 61981-CM-P-91; 61988-CM-P-91; 61992-CM-P-91; 61999-CM-P-91; and 62010-CM-P-

171. These 20 applications propose a transmitter site that is within 50 miles or the radio horizon of 163 post-1983, previously proposed MMDS stations, with application pending on September 12, 1991, the filing date of the Jasper applications.[283] The Jasper applications failed to include interference studies, as required by § 21.902(b) and (c), for 163 previously proposed MMDS stations with applications pending and to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, these 20 Jasper applicants failed to demonstrate that the station proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

172. The Jasper petitions list four grounds for reconsideration: (1) the Commission's insufficient detailing of the specific reasons for returning the applications; (2) the Commission's failure to indicate which applications, if any, established any valid cut-off period, thereby violating the applicants' *Ashbacker* rights; (3) the Commission's

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91). Another joint petition was filed on August 31, 1993, on behalf Application File Nos. 61905-CM-P-91; 61906-CM-P-91; 61974-CM-P-91; and 62000-CM-P-91. A single reconsideration petition also was filed on August 31, 1993 on behalf of Application File No. 61906-CM-P-91. The August 31, 1993 petitions were filed more than seven weeks after the date of the return notification letters and thus, were untimely. While petitioners refer to unidentified petitions for reconsideration "filed earlier," no earlier petitions were received for any of the Jasper applications. All of the petitioners, including those that filed timely: (1) maintain that the Commission bypassed the contact representative, thereby causing delays in the receipt of the return notification letters and resulting in late-filed petitions; and (2) complain that the applicants experienced delays in receiving the return notification letters, which consequently delayed the filing of their petitions for reconsideration.

Reconsideration petitions were not filed for Application File Nos. 62001-CM-P-91 through 62011-CM-P-91; 61993-CM-P-91 through 61998-CM-P-91; 61989-CM-P-91 through 61991-CM-P-91; 61982-CM-P-91 through 61987-CM-P-91; 61975-CM-P-91 through 61980-CM-P-91; 61972-CM-P-91; 61973-CM-P-91; 61969-CM-P-91; 61969-CM-P-91; 61963-CM-P-91 through 61967-CM-P-91; 61953-CM-P-91 through 61961-CM-P-91; 61941-CM-P-91 through 61951-CM-P-91; 61936-CM-P-91 through 61939-CM-P-91; 61925-CM-P-91 through 61933-CM-P-91; 61914-CM-P-91 through 61923-CM-P-91; 61911-CM-P-91; 61912-CM-P-91; 61907-CM-P-91; 61908-CM-P-91; and 61899-CM-P-91 through 61904-CM-P-91, which proposed the same transmitter site at Jasper, Texas and were filed on the same day as the petitioned applications.

[283] Twenty-nine of the post 1983 MMDS applications propose a transmitter site at Deridder, Louisiana (Application File Nos. 61611-CM-P-91 and 61643-CM-P-91 through 61670-CM-P-91). One hundred thirty-four of these post 1983 MMDS applications propose a transmitter site at Leesville, Louisiana (Application File Nos. 59760-CM-P-91; 59761-CM-P-91; 60202-CM-P-91 through 60255-CM-P-91; 60171-CM-P-91 through 60201-CM-P-91; and 60124-CM-P-91 through 60170-CM-P-91.)

failure to properly enunciate and/or premise its rules, policies, and reasons for return; and (4) the Commission's incorrect application of the location restrictions in the *1988 Public Notice*.[284] In addition, petitioners assert full compliance with the Commission's rules and waiver requirements and argue that: (1) the distance of the other proposed or existing stations from Jasper prohibits service to that community on a reliable basis; (2) the distance between the site proposed in the returned applications and the other stations' sites eliminates any realistic possibility of harmful interference; (3) the applicants' proposed site was carefully chosen to provide the most practical service to Jasper; and (4) there exist no reasonable alternative sites which would provide reliable service on a non-interference basis. Petitioners further maintain that the Commission has previously granted an MDS application, notwithstanding possible interference to the signals within the protected service area of another facility, when the applicant's engineering analysis and agreement with potentially affected parties overcame the presumption of harmful interference, citing *Austin Movie*. Contending that the Commission acted arbitrarily and capriciously by returning the applications without a "hard look," the petitioners claim that denial of the requested waiver would defeat the underlying purpose of the rule and *Public Notice* requirements, and effectively deny reliable service to Jasper.

173. Mexia, Texas. On February 28, 1992, certain petitioners filed 80 applications proposing the same transmitter site at Mexia, Texas. After reviewing the applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated February 18, 1993. The letters indicated that each application was returned because the applicant: (1) filed in the geographic area of other pending MMDS applications; (2) provided an inadequate interference analysis by failing to consider and serve all previously proposed and/or authorized ITFS or MMDS stations in the proposed area; and (3) filed a waiver request that failed to comply with § 21.19 requirements, and that without a waiver the applications were unacceptable for filing. Eighty-four reconsideration petitions for the 80 returned applications were filed on March 22, 1993 and/or July 27, 1993.[285]

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[284] The petitioners neglected to attach the "further Engineering Statement" referenced in the petitions, which promised to discuss the "more than adequate steps" taken to avoid interference.

[285] Individual reconsideration petitions were timely filed on March 22, 1993 for 38 applications (Application File Nos. 02261-CM-P-92; 02262-CM-P-92; 02264-CM-P-92; 02266-CM-P-92; 02267-CM-P-92; 02270-CM-P-92 through 02272-CM-P-92; 02275-CM-P-92; 02287-CM-P-92; 02289-CM-P-92; 02291-CM-P-92; 02292-CM-P-92; 02294-CM-P-92; 02301-CM-P-92; 02310-CM-P-92; 02313-CM-P-92; 02314-CM-P-92; 02319-CM-P-92; 02323-CM-P-92; 02327-CM-P-92 through 02329-CM-P-92; 02331-CM-P-92; 02334-CM-P-92 through 02339-CM-P-92; 02344-CM-P-92; 02350-CM-P-92; 02351-CM-P-92; 02354-CM-P-92 through 02356-CM-P-92; 02364-CM-P-92; and 02386-CM-P-92). A joint reconsideration petition was filed on July 27, 1993 for 41 additional applications

174. These 80 applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) two 1983 authorized MMDS stations;[286] (2) 45 1983 proposed MMDS stations, with applications pending on February 28, 1992, the filing date of the Mexia applications;[287] and (3) four post-1983, previously proposed MMDS stations, with applications pending on February 28, 1992.[288] These applications failed to include interference studies, as required by § 21.902(b) and (c), for two authorized MMDS stations and 45 previously proposed MMDS stations with applications pending. The interference studies submitted with the applications were inadequate in that they failed to include free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the authorized or previously proposed stations as required by § 21.902(c), (d) and (f). *See* § 21.902(e). In addition, the applicants failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, these applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

(Application File Nos. 02260-CM-P-92; 02263-CM-P-92; 02265-CM-P-92; 02268-CM-P-92; 02269-CM-P-92; 02277-CM-P-92; 02284-CM-P-92; 02286-CM-P-92; 02300-CM-P-92; 02302-CM-P-92; 02306-CM-P-92; 02307-CM-P-92; 02308-CM-P-92; 02311-CM-P-92; 02312-CM-P-92; 02315-CM-P-92 through 02317-CM-P-92; 02320-CM-P-92; 02321-CM-P-92; 02324-CM-P-92 through 02326-CM-P-92; 02330-CM-P-92; 02332-CM-P-92; 02342-CM-P-92; 02347-CM-P-92; 02349-CM-P-92; 02353-CM-P-92; 02367-CM-P-92; 02369-CM-P-92 through 02375-CM-P-92; 02378-CM-P-92; 02385-CM-P-92; 02387-CM-P-92; and 02388-CM-P-92) and for five applications for which petitions were earlier filed on March 22, 1993 (Application File Nos. 02271-CM-P-92; 02319-CM-P-92; 02329-CM-P-92; 02334-CM-P-92; 02344-CM-P-92).

The July 27, 1993 joint petition was untimely. The petitioners sought to incorporate by reference the timely filed March 22, 1993 petitions for "similarly situated applicants proposing to serve this [Mexia] market." Petitioners complain that MMDS applicants in some markets experienced delays in receiving return notification letters, and imply that their Mexia filing was delayed because the Commission did not mail a copy of each return letter to the contact representative named in the applications. Petitioners have offered no evidence to support these claims.

[286] WLW979 and WLW978 in Bryan, Texas.

[287] The 45 applications all specified a transmitter site at Waco, Texas (including, but not limited to, Application File Nos. 08418-CM-P-83; 16547-CM-P-83; 01879-CM-P-83; 06364-CM-P-83; 04395-CM-P-83; 04161-CM-P-83; 02345-CM-P-83; 12356-CM-P-83; and 02990-CM-P-83). Application File Nos. 08418-CM-P-83 (WMI865) and 16547-CM-P-83 (WHI625) were subsequently granted.

[288] Application File Nos. 1223-CM-P-92 (Corsicana, Texas); 58872-CM-P-91 (Dallas, Texas); and 50119-CM-P-90 and 50289-CM-P-89 (Athens, Texas).

175. Petitioners assert that the Mexia applications were acceptable for filing and contained all elements for the grant of any necessary waivers. In support, petitioners maintain that they submitted interference studies which demonstrated that there is no realistic possibility of harmful interference to any other existing or proposed stations, and served all known existing or proposed stations within 50 miles,[289] and that if additional stations do exist, petitioners should not be penalized if it is impossible to identify these other filings from the Commission's data base.[290] Petitioners claim that the Commission failed to give each waiver request a "hard look" by issuing a form letter, with no detailed analysis as to why the application was rejected,[291] and further contend that the Commission's summary return of the Mexia applications is arbitrary and capricious, and adopts more stringent separation standards *ex post facto*. Lastly, petitioners note that denial of the requested waiver would prevent Mexia from receiving reliable service and would defeat the underlying purpose of the pertinent rules and *Public Notice* requirements, which is to avoid harmful interference.

176. San Diego, Texas. On September 4, 1991, certain petitioners filed 131 MMDS applications proposing the same transmitter site at San Diego, Texas. After reviewing each of the applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letter dated May 5, 1993. The letters indicated that each application was returned because the applicant: (1) filed in the geographic area of authorized MMDS stations or other pending MMDS applications; (2) filed past the relevant cut-off period; and (3) filed inadequate interference analyses due to failure to serve all affected parties and/or to consider all previously proposed or authorized MMDS or ITFS stations. One hundred thirty-seven reconsideration petitions were filed on June 4, June 11, July 27, and August 31, 1993,

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[289] Petitioners assert that it is disingenuous for the Commission to return their applications for failing to file the required interference studies in light of the fact that the Commission waived the requirements of § 21.902(c)(2) for applicants to submit interference studies at the time of filing, citing *Donald E. Benson*. They also maintain that the Mexia applications cannot be returned for non-compliance with the *1988 Public Notice* because the *Notice* specifically contemplates the granting of waivers of the 50 mile restriction where the applicant has demonstrated non-interference, as petitioners claim to have done here.

[290] We note that the two 1983 authorized MMDS stations omitted from the interference analyses submitted with the Mexia applications had a public notice date of September 30, 1984. Forty-five of the previously proposed MMDS stations with applications pending at the time the Mexia applications were filed had a public notice date of April 25 or July 28, 1986.

[291] Petitioners also cite the *Lawrence N. Brandt* and *Donald E. Benson* cases in support of their request for a waiver of the 50 mile benchmark.

for the 130 returned applications.[292]

177. The applications propose a transmitter site that is within 50 miles or the radio horizon of four post-1983 previously proposed MMDS stations with applications pending on September 4, 1991, the filing date of the San Diego applications.[293] These applicants failed to submit interference studies, as required by § 21.902(b) and (c), for all four proposed MMDS stations, and to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, the San Diego applicants failed to demonstrate that the station proposed in the returned application would not cause harmful interference to authorized or previously proposed stations.

178. On reconsideration, petitioners assert that the San Diego applications contained all the elements for acceptance of the application and grant of any necessary waivers,[294] and that the Commission failed to clearly articulate the grounds for returning the San Diego applications, thereby violating the principles of reasoned and articulated decision-making. Petitioners argue that the Commission staff erred in returning the applications as cut-off because the return letters did not identify any previously filed applications, and that until the Commission specifically identifies these applications and allows a reasonable period for review and comment, the San Diego

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[292] Petitions were filed for Application File Nos. 61741-CM-P-91 through 61777-CM-P-91; 61779-CM-P-91 through 61806-CM-P-91; 61825-CM-P-91 through 61862-CM-P-91; and 61864-CM-P-91 through 61890-CM-P-91. Supplemental petitions were submitted for the same applications by the same attorney in seven instances (61768-CM-P-91; 61779-CM-P-91; 61864-CM-P-91; 61853-CM-P-91; 61791-CM-P-91; 61867-CM-P-91; and 61875-CM-P-91). No petitions were filed for two San Diego applications (61863-CM-P-91 and 61778-CM-P-91), which proposed the same transmitter site and which were filed and returned on the same date as the petitioned applications.

Petitions were timely filed June 4, 1993 for the following applications: 61750-CM-P-91; 61837-CM-P-91; 61752-CM-P-91; 61838-CM-P-91; 61755-CM-P-91; 61764-CM-P-91; 61779-CM-P-91; 61864-CM-P-91; 61865-CM-P-91; 61781-CM-P-91; 61867-CM-P-91; 61871-CM-P-91; 61787-CM-P-91; 61788-CM-P-91; 61789-CM-P-91; 61874-CM-P-91; 61791-CM-P-91; 61875-CM-P-91; and 61798-CM-P-91. The June 11, July 27, and August 31 petitions were filed more than 30 days after the date of the return letters sent to the San Diego, Texas applicants and thus, are untimely. Petitioners complain that they experienced delays in receiving the returned applications and the return notification letters, which purportedly delayed the filing of their petitions for reconsideration.

[293] These four post-1983 previously proposed MMDS stations, which were all granted after the filing date of the San Diego applications, are WLW896, WLW892 (Falfurrias, Texas), WLW900, and WLW904 (George West, Texas).

[294] However, the San Diego applications did not include a waiver request.

applicants' *Ashbacker* rights have been denied.[295] Petitioners further argue that the decision to return the San Diego applications for alleged non-compliance with the *1988 Public Notice* is similarly misplaced, because the *Notice* specifically contemplates the granting of waivers of the 50 mile restriction where the applicant has demonstrated non-interference, as petitioners claim to have done here.[296] Petitioners also assert that they served all known existing or proposed MMDS and ITFS stations within 50 miles, and that if additional stations do exist, petitioners should not be penalized if it is impossible to identify these other filings from the Commission's data base. Petitioners conclude that the staff's decision to deny their waiver request is arbitrary and capricious because the applicants demonstrated that no harmful interference would result to any other station, and reliable service to San Diego would be denied if the decision is allowed to stand.

179. Price, Utah. On March 24, 1992, certain petitioners filed 24 applications proposing the same transmitter site at Price, Utah. After reviewing each of the 24 Price applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated June 23, 1993. The letters indicated that each application was returned because the applicant: (1) filed in the geographic area of other pending MMDS applications; and (2) submitted an inadequate interference analysis due to failure to consider and serve all previously proposed or authorized ITFS or MMDS stations. Reconsideration petitions were filed on August 31, 1993 for these 24 returned MMDS applications.[297]

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[295] Petitioners misinterpret the return letters as applying the cut-off periods established in both § 21.31 and § 21.914. While, as petitioners correctly point out, the public notice cut-off procedure in § 21.31 was replaced by the same calendar day cut-off rule specified in § 21.914 for applications filed after October 31, 1990, the two rules still must be read in conjunction, because § 21.31 defines such relevant terms as "mutually exclusive" and "newly filed application."

[296] Petitioners also cite the *Austin Movie, Lawrence N. Brandt*, and *Donald E. Benson* cases as instances where the Commission has indicated it would waive the requirements of § 21.902. They further contend that the summary return of the San Diego applications, which purportedly demonstrate no harmful interference to any other existing or proposed stations, is procedurally unfair, arbitrary and capricious, and adopts more stringent separation standards *ex post facto*.

[297] These 24 applicants for the E channel filed a joint petition for Application File Nos. 3348-CM-P-92 through 3357-CM-P-92; 3454-CM-P-92 through 3458-CM-P-92; 3461-CM-P-92 through 3464-CM-P-92; and 3490-CM-P-92 through 3494-CM-P-92. These petitions were filed more than two months after the date of the return letters sent to the applicants and thus, are untimely. While petitioners refer to an unidentified petition for reconsideration "filed earlier," no earlier petition was received for any of the Price applications. Other than asserting that the Commission in "several instances"

180. These 24 applications propose a transmitter site that is within 50 miles or the radio horizon of 19 post-1983, previously proposed MMDS stations at Chester, Utah, with applications pending on March 24, 1992, the filing date of the Price applications.[298] The 24 Price applications failed to include interference studies, as required by § 21.902(b) and (c), for these 19 previously proposed MMDS stations. The applicants also failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, these 24 applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to previously proposed stations.

181. On reconsideration, the Price petitioners assert the Commission erred in returning the applications for the following reasons which were listed, without discussion, in the untimely petitions: (1) insufficient detailing of the specific reasons for such returns; (2) no indication of which applications establish any valid cut-off period, thus denying applicants' *Ashbacker* rights; (3) failure to properly enunciate the Commission's rules and reasons for return, citing *McElroy Electronics*; and (4) incorrect application of the 50 mile location restrictions. Petitioners also assert that the Price applications were acceptable for filing and contained all necessary waiver requests. None of the 24 applications, however, contained a waiver request. Additionally, petitioners attempt to incorporate by reference arguments made in an "above-referenced Petition for Reconsideration filed earlier." No filing date or application file number is supplied for this petition and no earlier petition was received by the Commission for any Price application. Thus, the Commission has considered only those arguments made in the instant petitions.[299]

182. Richfield, Utah. On February 4, 1991, certain petitioners filed two applications proposing the same transmitter site at Richfield, Utah.[300] After reviewing each of the Richfield applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated May 12, 1993. The letters indicated that each application was returned because the applicant: (1) performed an inadequate interference analysis by failing to serve all affected parties with interference studies and/or by failing to consider all previously proposed or

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did not return applications to the contact representative specified in the applications, petitioners have offered no explanation for their late filing.

[298] Application File Nos. 51990-CM-P-92 through 52008-CM-P-92.

[299] The petitions also refer to an application and engineering statement attached to the petition filed for the first-named applicant in the caption, and to some attached letters from unidentified MMDS applicants. None of the petitions filed for the 24 Price applicants, however, included any attachments.

[300] Application File Nos. 57529-CM-P-91 and 57530-CM-P-91.

authorized MMDS or ITFS stations; (2) filed past the relevant cut-off period as established in § 21.31 or § 21.914; and (3) filed in the geographic area of an authorized MMDS station or pending MMDS application. Reconsideration petitions were filed on August 31, 1993 for the two returned applications.[301]

183. These two applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) 125 1983 proposed MMDS stations, with applications pending on February 4, 1991, the filing date of the Richfield applications;[302] (2) 26 post-1983 previously proposed MMDS stations, with applications pending on February 4, 1991, the filing date of the Richfield applications.[303] These applications failed to include interference studies, as required by § 21.902(b) and (c), for 151 previously proposed MMDS stations with applications pending. In addition, the applicants failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, the Richfield applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

184. The Richfield petitioners assert that the applicants fully complied with the Commission's rules and waiver requirements. However, the petitioned Richfield applications did not include a waiver request. Specifically, petitioners contend that, because the required interference analyses were supplied and showed that no harmful interference would result from granting the applications, the Commission acted arbitrarily and capriciously in returning the applications without a "hard look" at the applicants' eligibility for a waiver of the *1988 Public Notice* location restriction, and

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[301] These reconsideration petitions were filed more than three months after the date of the return letters sent to the applicants. Petitioners argue that the petitions should be accepted because the Commission's failure to return the applications to the designated contact representative caused delays in filing the petitions. They do not, however, allege that the Richfield applicants failed to receive the return letters in a timely manner. No petitions were filed for 43 other Richfield applications, which proposed the same transmitter site and were filed and returned on the same date as the petitioned applications.

[302] Including, but not limited to, Application File Nos. 15153-CM-P-83 and 07490-CM-P-83 (Provo, Utah); and 14691-CM-P-83 and 13821-CM-P-83 (Salt Lake City, Utah). Application File Nos. 02821-CM-P-83 (WMH696 at Provo) and 13156-CM-P-83 (WHT692 at Salt Lake City) were subsequently granted.

[303] All 26 applications specified a transmitter site at Delta, Utah (including, but not limited to, Application File Nos. 52033-CM-P-90; 52199-CM-P-90; 54384-CM-P-90 through 54404-CM-P-90). Application File Nos. 52033-CM-P-90 (WMI399) and 52199-CM-P-90 (WMI395) were subsequently granted.

without a careful review of the applicants' showing.[304]

185. Warsaw, Virginia. On November 12, 1991, certain petitioners filed two applications proposing the same transmitter site at Warsaw, Virginia. After reviewing each of the Warsaw applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated October 20, 1992. The letters indicated that each application was returned because the applicant (1) filed in the geographic area of pending MMDS applications; and (2) filed on a date not designated by the Commission. Reconsideration petitions were filed on November 19, 1992, for the two returned applications.[305]

186. These two applications propose a transmitter site that is within 50 miles or the radio horizon of 15 1983 previously proposed MMDS stations, with applications pending on November 12, 1991, the filing date of the Warsaw applications.[306] The applicants failed to include interference studies, as required by § 21.902(b) and (c), for one previously proposed MMDS station. The interference studies that were submitted were inadequate in that they: (1) failed to submit free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the authorized or previously proposed stations, as required by § 21.902 (c), (d) and (f) (*see* § 21.902(e)); (2) indicated terrain blockage, but did not include supporting demonstration such as shadow maps or terrain profile; (3) used incorrect methodology to calculate the protected service area of previously proposed stations; (4) used incorrect antenna specifications; and (5) contained incorrect technical parameters for the

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[304] Petitioners also argue that the Commission failed to: (1) indicate which other applications were filed before the Richfield applications for the same geographic area and that the applicants' *Ashbacker* rights were denied because they have been unable to challenge these prior-filed applications; (2) provide sufficient detail of the specific reasons for the return of the applications and that its failure to enunciate the reasons for return is contrary to the requirements of reasoned and articulated decision-making; and (3) correctly apply the "so called 15/50 mile rules" *vis-a-vis* existing or proposed MMDS operations. Petitioners also maintain that the Richfield applications should be accepted because reliable service to Richfield would otherwise be effectively denied, given the distance between Richfield and other authorized or proposed MMDS stations.

[305] Petitions were filed for Application File Nos. 51697-CM-P-92 and 51741-CM-P-92.

[306] These include 13 applications for Richmond, Virginia (Application File Nos. 02509-CM-P-83; 12556-CM-P-83; 06094-CM-P-83; 04036-CM-P-83; 00215-CM-P-83; 07921-CM-P-83; 06710-CM-P-83; 01652-CM-P-83; 15157-CM-P-83; 11562-CM-P-83; 03470-CM-P-83; 04020-CM-P-83 and 00684-CM-P-83) and two for Washington, D.C. (02884-CM-P-83 and 11849-CM-P-83). Application File No. 15157-CM-P-83 (WHT736) was granted subsequent to the filing of the Warsaw applications. Petitioners did not identify this application in their interference descriptive language.

previously proposed or newly-proposed station, such as the transmitting antenna gain and the reference receiving antenna gain. The ITFS interference studies filed were also invalid, because incorrect technical specifications for ITFS stations were used.[307] In addition, the applicants failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, the Warsaw applicants failed to demonstrate that the station proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations. Neither application contained a waiver request.

187. On reconsideration, the Warsaw petitioners assert that the returned applications complied with the Commission's rules and waiver requirements. Petitioners maintain that because all required interference analyses were submitted and demonstrate that no harmful interference would result from granting the applications, and they have committed to make every effort to avoid harmful interference to others and to cooperate in good faith should any interference occur in the future, the Commission acted arbitrarily and capriciously by returning the applications without a "hard look."[308] Petitioners argue that the Commission's decision to return the Warsaw applications for alleged non-compliance with the *1988 Public Notice* is similarly misplaced, because, they argue, the *Public Notice* specifically contemplates the granting of waivers of the 50 mile restriction where the applicant has demonstrated non-interference, as petitioners claim they have done here.[309] Petitioners further contend that the Commission's summary return of the Warsaw applications, which they maintain demonstrate no harmful interference to any existing or proposed stations, is procedurally unfair, arbitrary and capricious, and adopts more stringent separation standards *ex post facto*. Petitioners conclude that denial of the requested waiver would

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[307] The returned applications were required to submit interference analyses for Stations WHF243 (King William, Virginia) and WHG411 (Mathews, Virginia).

[308] Petitioners further contend that the distance of the other proposed or existing stations from Warsaw prohibits service to Warsaw on a reliable basis by those stations and that the proposed site was carefully chosen to provide the most practical service to Warsaw. In addition, the petitioners cite *Austin Movie* for the proposition that the Commission may grant applications notwithstanding possible interference to the protected service area of other stations, when the applicant's engineering analysis and the agreement with potentially affected parties overcame the presumption of harmful interference.

[309] Petitioners cite *Lawrence N. Brandt* and *Marylan J. Benson* as confirmation of the Commission's policy permitting waiver of the 50 mile location restriction upon a showing of lack of harmful interference to cochannel or adjacent channel stations operating within 50 miles or the radio horizon of a transmitter site, and to distinguish the instant waiver request from two that were denied for having failed to provide all of the requisite interference analyses.

defeat the underlying purpose of the rule and *1988 Public Notice*, and effectively deny reliable service to Warsaw.

188. Colfax, Washington. On September 30, 1991, certain petitioners filed 101 applications proposing the same transmitter site at Colfax, Washington. After reviewing each of the Colfax applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letter dated May 12, 1993. The letters indicated that each application was returned because the applicant: (1) filed in the geographic area of other pending or authorized MMDS applications; (2) filed past the relevant cut-off period; and (3) filed inadequate interference analyses due to failure to serve all affected parties and/or to consider all previously proposed or authorized MMDS or ITFS stations. With regard to the applicants' request for a waiver of the 50 mile location restriction in the *1988 Public Notice*, the return letters indicated that the applications failed to comply with the waiver requirements in § 21.19, and that without a waiver, the applications were unacceptable for filing. Reconsideration petitions were filed on August 31, 1993 for the 101 returned applications.[310]

189. These 101 applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) two post-1983 authorized MMDS stations;[311] and (2) 136 post-1983, previously proposed MMDS stations, with applications pending on September 30, 1991, the filing date of the Colfax applications.[312] These applications failed to include interference studies, as required by §§ 21.902(b) and (c), for 128 previously proposed MMDS stations with applications pending. The interference studies that were submitted

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[310] Petitions were filed for Application File Nos. 62434-CM-P-91 through 62478-CM-P-91; 62481-CM-P-91 and 62499-CM-P-91; 62500-CM-P-91 through 62534-CM-P-91; 62566-CM-P-91; and 62607-CM-P-91. These reconsideration petitions were filed more than three months after the return notification letters were sent to the Colfax applicants and thus, are untimely. While petitioners refer to an unidentified petition for reconsideration "filed earlier," no earlier petitions were received for any of the Colfax applications. Petitioners also complain that they experienced delays in receiving the returned applications and return notification letters, which purportedly delayed the filing of their petitions for reconsideration. In support, they refer to two attached letters (upon inspection, not attached to applications or petitions) from San Diego, Texas, MMDS applicants alleging that the correct applications were not attached to the return notification letters they received. The Colfax petitioners have offered no proof that they experienced any delay in receiving the return notification letters relating to the Colfax applications.

[311] WHT783 and WHT784 in Spokane, Washington.

[312] All 136 applications propose a transmitter site at Lewiston, Idaho (including, but not limited to, Application File Nos. 54161-CM-P-90; 54158-CM-P-90; 50773-CM-P-90; and 50763-CM-P-90).

131 returned applications.[314]

192. These 131 applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) 41 1983 proposed MMDS stations at Charleston, West Virginia, with applications pending on March 6, 1992, the filing date of the Beckley applications;[315] and (2) two post-1983, previously proposed MMDS stations, with applications pending on March 6, 1992.[316] These applications failed to include interference studies, as required by § 21.902(b) and (c), for 42 previously proposed MMDS stations with applications pending. Moreover, the interference studies that were

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[314] Petitions were filed for Application File Nos. 02499-CM-P-92 through 02518-CM-P-92; 02521-CM-P-92; 02522-CM-P-92; 02538-CM-P-92; 02556-CM-P-92 through 02562-CM-P-92; 02564-CM-P-92 through 02575-CM-P-92; 02583-CM-P-92 through 02592-CM-P-92; 02596-CM-P-92 through 02606-CM-P-92; 02612-CM-P-92 through 02631-CM-P-92; 02637-CM-P-92 through 02646-CM-P-92; 02652-CM-P-92 through 02660-CM-P-92; 02702-CM-P-92 through 02711-CM-P-92; 02720-CM-P-92 through 02728-CM-P-92; 02774-CM-P-92 through 02783-CM-P-92. No petition was filed for Application File No. 02555-CM-P-92, which proposed the same transmitter site and was filed and returned on the same dates as the petitioned applications. Multiple petitions were submitted for the same application by the same attorney in several instances.

Reconsideration petitions were filed for the following applications on August 3 or August 31, 1993, approximately six months after the date of the return letters sent to the applicants: Application File Nos. 02711-CM-P-92; 02704-CM-P-92; 02660-CM-P-92; 02585-CM-P-92; 02508-CM-P-92; 02619-CM-P-92; 02707-CM-P-92; 02562-CM-P-92; 02646-CM-P-92; 02706-CM-P-92; 02575-CM-P-92; 02657-CM-P-92; 02643-CM-P-92; 02613-CM-P-92; 02557-CM-P-92; 02499-CM-P-92; 02652-CM-P-92; 02521-CM-P-92; 02653-CM-P-92; 02621-CM-P-92; 02637-CM-P-92; 02502-CM-P-92; 02506-CM-P-92; 02574-CM-P-92; 02656-CM-P-92; 02705-CM-P-92; 02507-CM-P-92; 02614-CM-P-92; 02558-CM-P-92; 02606-CM-P-92; 02517-CM-P-92; 02512-CM-P-92; 02516-CM-P-92; 02599-CM-P-92; 02566-CM-P-92; 02518-CM-P-92; 02601-CM-P-92; 02628-CM-P-92; 02603-CM-P-92; 02779-CM-P-92; 02515-CM-P-92; 02727-CM-P-92; 02629-CM-P-92; 02538-CM-P-92; 02777-CM-P-92; 02590-CM-P-92; 02626-CM-P-92; 02511-CM-P-92; 02724-CM-P-92; 02514-CM-P-92; 02774-CM-P-92; 02720-CM-P-92; 02723-CM-P-92; 02604-CM-P-92; 02600-CM-P-92; 02589-CM-P-92; 02605-CM-P-92; 02722-CM-P-92; 02778-CM-P-92; 02703-CM-P-92; 02509-CM-P-92; 02588-CM-P-92; and 02780-CM-P-92. Petitioners complain that they experienced delays in receiving the returned applications and the return letters, which delayed the filing of their petitions for reconsideration, but offer no proof of this delay.

[315] Application File No. 11932-CM-P-83 (WMH629) was granted subsequent to the filing of the Beckley applications.

[316] Application File Nos. 55627-CM-P-91 and 55628-CM-P-91 (Raleigh, West Virginia).

were inadequate because they failed to include free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the authorized or previously proposed stations as required by § 21.902 (c), (d), and (f). *See* § 21.902 (e). In addition, the applicants failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, the Colfax applicants failed to demonstrate that the station proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

190. The Colfax petitioners primarily assert that the returned applications fully complied with the Commission's rules and waiver requirements. Petitioners contend that, because all required interference analyses were supplied and showed that no harmful interference would result from granting the applications, the Commission acted arbitrarily and capriciously in returning the applications without a "hard look" at the applicants' eligibility for a waiver and without a careful review of the applicants' showing. Petitioners also argue that a waiver would serve the public interest because other MMDS stations would not be able to reliably serve the special community needs of Colfax. [313]

191. Beckley, West Virginia. On March 6, 1992, certain petitioners filed 131 applications proposing the same transmitter site at Beckley, West Virginia. After reviewing each of the Beckley applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated March 10, 1993. The letters indicated that each application was returned because the applicant: (1) filed in the geographic area of other authorized or pending MMDS applications; (2) filed past the relevant cut-off period; and (3) filed inadequate interference analyses due to failure to serve all affected parties and/or to consider all previously proposed or authorized MMDS or ITFS stations. One hundred forty-one reconsideration petitions were filed on April 9, August 3, and August 31, 1993, for the

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[313] Petitioners also argue that the applications should be reinstated because the Commission failed to: (1) return the applications to the contact representative, which caused delays in both the receipt of return letters and the filing of petitions; (2) indicate which other applications were filed before the Colfax applications were filed for the same geographic area, and that the applicants' *Ashbacker* rights were denied because they have been unable to challenge these prior-filed applications; and (3) provide sufficient detail of the specific reasons for the return of the applications, contrary to the requirements of reasoned and articulated decision-making. Petitioners also attempt to incorporate by reference arguments made in an "above-referenced petition" filed earlier. However, no filing date is supplied and no earlier filed petitions were received by the Commission for any of the Colfax applications. Thus, the Commission has considered only those arguments in the instant petitions.

submitted were inadequate because they failed to include free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the authorized or previously proposed stations as required by §§ 21.902(c), (d), and (f). *See* § 21.902(e). In addition, the applicants failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, the Beckley applicants failed to demonstrate that the stations proposed in the returned application would not cause harmful interference to authorized or previously proposed stations.

193. On reconsideration, petitioners assert that the Beckley applications contained all necessary elements for acceptance of the application and grant of any necessary waivers.[317] Petitioners argue that the Commission staff erred in returning the applications as cut-off because the return letters did not identify any previously filed applications, and that until the Commission specifically identifies these applications and allows a reasonable period for review and comment, the Beckley applicants' *Ashbacker* rights have been denied.[318] Petitioners further argue that the decision to return the Beckley applications for alleged non-compliance with the *1988 Public Notice* is similarly misplaced, because the *Notice* specifically contemplates the granting of waivers of the 50 mile restriction where the applicant has demonstrated non-interference, as petitioners claim to have done here.[319] Petitioners also assert that they served all known existing or proposed MMDS and ITFS stations within 50 miles, and that if additional stations do exist, petitioners should not be penalized if it is impossible to identify these other filings from the Commission's data base. According to the petitioners, the decision to deny their waiver request is arbitrary and capriciousbecause they demonstrated that no

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[317] Petitioners note that the return letters did not specifically cite the failure to comply with the requirements for a waiver as a reason for returning the Beckley applications. After a thorough review of the petitioners' showing in support of their waiver request, we conclude that the staff properly denied the request for the reasons stated in Section IV of this Order.

[318] Petitioners misinterpret the return letters as applying the cut-off periods established in both § 21.31 and § 21.914. While, as petitioners correctly point out, the public notice cut-off procedure in § 21.31 was replaced by the same calendar day cut-off rule specified in § 21.914 for applications filed after October 31, 1990, the two rules still must be read in conjunction, because § 21.31 defines such relevant terms as "mutually exclusive" and "newly filed application."

[319] Petitioners also cite the *Austin Movie, Lawrence N. Brandt*, and *Donald E. Benson* cases as instances where the Commission has indicated it would waive the requirements of § 21.902. They further contend that the summary return of the Beckley applications, which purportedly demonstrate no harmful interference to any other existing or proposed stations, is procedurally unfair, arbitrary and capricious, since it adopts more stringent separation standards *ex post facto*.

harmful interference would result to any other station, and reliable service to Beckley would be denied if the decision is allowed to stand. [320]

194. Logan, West Virginia. On March 30, 1992, certain petitioners filed 130 applications proposing the same transmitter site at Logan, West Virginia. After reviewing the Logan applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated March 10, 1993. The letters indicated that each application was returned because the applicant: (1) performed an inadequate interference analysis by failing to serve all affected parties with interference studies and to consider all previously proposed or authorized MMDS or ITFS stations pursuant to § 21.902(c) and/or 21.902(i); (2) filed past the relevant cut-off period as established in § 21.31 or § 21.914; and (3) filed in the geographic area of an authorized MMDS station or pending MMDS application. Reconsideration petitions were filed on August 31, 1993 for the 130 returned applications.[321]

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[320] The untimely Beckley petitions also contained the following arguments: (1) that the untimely petitions should be accepted because the Commission failed to return the applications to the designated contact representative, which caused delays in both the receiving of the return notifications and the sending of petitions although no proof is offered to support this assertion; (2) that the Commission failed to indicate which other applications were filed before the Beckley applications were filed for the same geographic area and that the applicants' *Ashbacker* rights were denied because they have been unable to challenge these prior-filed applications; and (3) that the Commission failed to provide sufficient detail of the specific reasons for the return of the applications and that its failure to enunciate the reasons for return is contrary to the requirements of reasoned and articulated decision-making, citing *McElroy Electronics*. In addition, the untimely petitions attempt to incorporate by reference arguments made in the "above-referenced Petition for Reconsideration filed earlier," presumably referring to the timely April 9, 1993 petitions. The arguments presented in those timely petitions were discussed above.

[321] A joint reconsideration petition was filed for Application File Nos. 03541-CM-P-92 through 03556-CM-P-92; 03563-CM-P-92; 03564-CM-P-92; 03571-CM-P-92 through 03576-CM-P-92; 03578-CM-P-92 through 03586-CM-P-92; 03588-CM-P-92 through 03594-CM-P-92; 30596-CM-P-92; 03602-CM-P-92; 03603-CM-P-92; 03605-CM-P-92; 03607-CM-P-92; 03608-CM-P-92; 03610-CM-P-92; 03611-CM-P-92; 03613-CM-P-92; 03614-CM-P-92; 03616-CM-P-92; 03619-CM-P-92; 03636-CM-P-92; 03640-CM-P-92; 03642-CM-P-92; 03643-CM-P-92; 03645-CM-P-92; 03660-CM-P-92; 03661-CM-P-92; 03664-CM-P-92; 03666-CM-P-92; 03667-CM-P-92; 03669-CM-P-92; 03673-CM-P-92; 03676-CM-P-92; 03680-CM-P-92; 03682-CM-P-92; 03684-CM-P-92; 03685-CM-P-92; 03687-CM-P-92; 03688-CM-P-92; 03690-CM-P-92; 03691-CM-P-92; 03693-CM-P-92; 03696-CM-P-92; 03700-CM-P-92; 03704-CM-P-92; 03707-CM-P-92; 03708-CM-P-92; 03710-CM-P-92; 03715-CM-P-92; 03720-CM-P-92; 03722-CM-P-92; 03723-CM-P-92; 03725-CM-P-92 through 03739-CM-P-92; 03742-CM-P-92; 03748-CM-P-92 through

195. These 130 applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) 46 1983 proposed MMDS stations, with applications pending on March 30, 1992, the filing date of the Logan applications;[322] and (3) 140 post-1983, previously proposed MMDS stations, with applications pending on March 30, 1992.[323] These applications failed to include interference studies, as required by § 21.902(b) and (c), for 182 previously proposed MMDS stations with applications pending. The interference studies actually submitted with the application were inadequate because they failed to include free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the previously proposed stations, as required by § 21.902(c), (d) and (f). *See* § 21.902(e). In addition, the applicants failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, the Logan applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

196. The Logan petitioners assert that they fully complied with the Commission's rules and waiver requirements. Specifically, petitioners contend that, because the

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3752-CM-P-92; 03755-CM-P-92; 03756-CM-P-92; 03758-CM-P-92 through 03762-CM-P-92; 03764-CM-P-92 through 03766-CM-P-92; 03771-CM-P-92 through 03781-CM-P-92; 03783-CM-P-92; 03784-CM-P-92; 03786-CM-P-92; and 03787-CM-P-92. No petitions were filed for Application File Nos. 03577-CM-P-92 and 03587-CM-P-92, which also proposed the same transmitter site at Logan, and were filed and returned on the same dates as the petitioned applications.

The Logan reconsideration petitions were filed more than five months after the date of the return notification letters sent to the applicants, and thus, are untimely. While petitioners refer to a petition "filed earlier," no such petition was received by the Commission. Other than asserting that the Commission in "several instances" did not return applications to the contact representative specified in the applications, thereby "creating the possibility of insufficient notice of its actions," petitioners have offered no explanation for their late filing. We note that the return letters were mailed to the applicants, one of whom was also the contact representative specified in the applications.

[322] The 1983 proposed stations include 45 applications for Charleston, West Virginia (including, but not limited to, Application File Nos. 08167-CM-P-83; 01712-CM-P-83; 04327-CM-P-83; and 04488-CM-P-83) and one application for Huntington, West Virginia (Application File No. 02665-CM-P-83). Application File No. 11932-CM-P-83 was subsequently granted (WHM629 at Charleston).

[323] The post-1983 proposed stations include 132 applications for Beckley, West Virginia, which are discussed at ¶¶ 191-193, *supra*; Application File Nos. 55625-CM-P-91 and 55626-CM-P-91 (Pikeville, Kentucky); 55627-CM-P-91 and 55628-CM-P-91 (Raleigh, West Virginia); 52020-CM-P-92 and 51024-CM-P-92 (Huntington, West Virginia); and 02821-CM-P-92 and 02824-CM-P-92 (Whithy, West Virginia).

required interference analyses demonstrated that no harmful interference would result from granting the applications, the Commission acted arbitrarily and capriciously in returning the applications without a "hard look" at the applicants' eligibility for a waiver of the *1988 Public Notice* location restriction, and without a careful review of the applicants' showing. Petitioners also argue that their applications should be accepted because reliable service to Logan would otherwise be denied, given the distance between authorized or previously proposed MMDS stations and Logan.[324]

197. Petersburg, West Virginia. On July 23, 1991, certain petitioners filed two applications proposing the same transmitter site at Petersburg, West Virginia. After reviewing each of the Petersburg applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated April 22, 1993. The letters indicated that each application was returned because the applicant: (1) performed an inadequate interference analysis by failing to serve all affected parties with interference studies and by failing to consider all previously proposed or authorized MMDS or ITFS stations; (2) filed in the geographic area of a pending MMDS application; (3) failed to specify type-accepted equipment pursuant to § 21.120; and (4) failed to submit sufficient, specific maintenance information pursuant to § 21.15(e). Reconsideration petitions were filed on August 31, 1993 for the two returned applications.[325]

198. These two applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) one 1983 proposed MMDS station, with an application pending on July 23, 1991, the filing date of the Petersburg applications;[326] and (2) five post-1983,

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[324] Petitioners also argue that the Commission: (1) failed to identify the previously filed applications for the same geographic area, thereby denying the applicants' *Ashbacker* rights to challenge these prior-filed applications; (2) failed to provide sufficient detail of the specific reasons for the return of the applications, contrary to the requirements of reasoned and articulated decision-making; and (3) incorrectly applied the "so called 15/50 mile rules" *vis-a-vis* existing or proposed MMDS operations.

[325] Reconsideration petitions were filed for Application File Nos. 60914-CM-P-91 and 60915-CM-P-91. Both petitions, which were filed on August 31, 1993 (more than four months after the April 22, 1993 return notification letters) are untimely. Petitioners argue that their petitions should be accepted because the Commission's failure to return the applications to the designated "contact representative," caused delays in filing the petitions. However, an examination of the Petersburg applications revealed that no contact representative was even named.

[326] Application File No. 15425-CM-P-83.

previously proposed MMDS stations, with applications pending on July 23, 1991.[327] These applications failed to include interference studies, as required by § 21.902(b) and (c), for one authorized MMDS stations and five previously proposed MMDS stations with applications pending. In addition, the applicants failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, the Petersburg applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

199. The Petersburg petitioners assert that the applicants fully complied with the Commission's rules and waiver requirements. However, the applications did not include a waiver request. Specifically, the petitioners contend that, because the required interference analyses were supplied and showed that no harmful interference would result from granting the applications, the Commission acted arbitrarily and capriciously in returning the applications without a "hard look" at the applicants' eligibility for a waiver of the *1988 Public Notice* location restriction, and without a careful review of the applicants' showing.[328] Petitioners also maintain that there were no reasonable alternative sites from which to provide reliable service on a non-interference basis.[329]

200. Portage, Wisconsin. On October 2, 1991, certain petitioners filed four MMDS applications proposing the same transmitter site at Portage, Wisconsin. After reviewing each of the four Portage applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated

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[327] Including two applications for Bridgewater, Virginia, two applications for Strasburg, West Virginia and one application for Basye, West Virginia (Application File Nos. 56951-CM-P-91; 56950-CM-P-91; 58541-CM-P-91; 57291-CM-P-91; and 57290-CM-P-91). Application File Nos. 56951-CM-P-91 and 56950-CM-P-91 were subsequently granted (WMX327 and WMX331).

[328] In support, the petitioner cites *Austin Movie* for the proposition that the Commission has previously granted MMDS applications despite potential interference problems when an applicant shows such potential interference problems have been resolved.

[329] In addition, petitioners assert that the Commission failed to: (1) indicate which other applications were filed before the Petersburg applications for the same geographic area, thereby denying the applicants' *Ashbacker* rights to challenge these prior-filed applications; (2) provide sufficient detail of the specific reasons for the return of the applications, contrary to the requirements of reasoned and articulated decision-making; and (3) correctly apply the "so called 15/50 mile rules" vis-a-vis existing or proposed MMDS operations. Petitioners further assert that the Petersburg applications should be accepted because reliable service to Petersburg would otherwise be effectively denied, given the distance of other authorized or previously proposed MMDS stations to Petersburg.

October 15, 1992. The letters indicated that each application was returned because the applicant filed in the geographic area of authorized MMDS stations. Reconsideration petitions were filed on November 16, 1992 for the four returned applications.[330]

201. These four applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) one 1983 authorized MMDS station;[331] (2) one 1983 proposed MMDS station, with an application pending on October 2, 1991, the filing date of the four Portage applications;[332] (3) one post-1983 authorized MMDS station;[333] and (4) 23 post-1983, previously proposed MMDS stations, with applications pending on the filing date of the four Portage applications.[334] These four Portage applications failed to include interference studies, as required by §§ 21.902(b) and (c), for 20 previously proposed MMDS stations with applications pending. The interference studies that were submitted were inadequate in that they: (1) failed to include free space calculations of the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the previously proposed or authorized stations as required by §21.902(c), (d) and (f) (*see* § 21.902(e)); and (2) contained incorrect technical parameters such as the transmitting antenna gain and the reference receiving gain. These applicants also failed to comply with the requirements of § 21.901(d)(1) for ITFS interference protection because free space calculations were not submitted for each registered receive site of each ITFS licensee with an authorized transmitter site within 50 miles of the proposed MMDS stations' proposed transmitter site. In addition, the applicants failed to satisfy the requirements for service of interference studies stipulated by § 21.902(g). Thus, the Portage applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations. No waiver requests were included in the Portage applications.

202. The Portage petitioners, however, assert that the returned applications were acceptable for filing and contained all necessary elements for the grant of any necessary waivers.[335] In support, petitioners maintain that they served all known existing or

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[330] Petitions were filed for Application File Nos. 50015-CM-P-92; 50029-CM-P-92; 50037-CM-P-92; and 50080-CM-P-92.

[331] WDU380 in Madison, Wisconsin.

[332] Application File No. 13869-CM-P-83 (Milwaukee, Wisconsin).

[333] WHT772 in Madison, Wisconsin.

[334] These 23 applications include one application for Waupun, Wisconsin, two applications for Mauston, Wisconsin, and 20 applications for Tomah, Wisconsin (including, but not limited, to Application File Nos. 59419-CM-P-91 through 59436-CM-P-91).

[335] Petitioners cite *Lawrence N. Brandt* and *Marylan J. Benson* as instances where the Commission has indicated it would waive the requirements of § 21.902.

proposed stations within 50 miles. Petitioners further assert that their interference analysis demonstrates no realistic possibility of harmful interference to the existing or proposed stations and note that the Commission has granted waivers of the 50 mile restriction when the applicant's engineering analysis and agreement with potentially affected parties overcame the presumption of harmful interference, citing *Austin Movie*. Contending that the Commission acted arbitrarily and capriciously by returning the applications without a "hard look,"[336] petitioners claim that denial of the requested waiver would defeat the underlying purpose of the rule and *1988 Public Notice* requirements, and effectively deny reliable service to Portage.

IV. DISCUSSION

203. Untimely Petitions for Reconsideration. As a preliminary matter, we note that 2,355 petitions for reconsideration were untimely filed. Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405 (1988), requires that petitions for reconsideration "must be filed within thirty days from the date upon which public notice is given of the order, decision, report or action complained of."[337] Because the time period for filing petitions for reconsideration is prescribed by statute, the Commission may not ordinarily waive or extend the filing period. [338]

204. The United States Court of Appeals for the D.C. Circuit in *Gardner v. FCC*, 530 F.2d 1086, 1090-91 (D.C. Cir. 1976), created a narrow exception to the statutory filing period by holding that the Commission may extend or waive the 30-day filing period in the "extraordinary case" where the late-filing is due to the Commission's failure to give customary notice of the action for which reconsideration is sought. *See Reuters Ltd. v. FCC*, 781 F.2d at 952. Pursuant to *Gardner*, a defect in notice will have

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[336] Petitioners also maintain that the Commission's dismissal of the applications (which purportedly demonstrate no harmful interference) is procedurally unfair since it adopts more stringent standards *ex post facto*.

[337] Section 1.106(f) of the Commission's Rules, which implements this statutory mandate, establishes that a petition for reconsideration for these returned applications must be filed within 30 days from the date of the return notification letter.

[338] *See Reuters Ltd. v. FCC*, 781 F.2d 946, 952 (D.C. Cir. 1986) ("[W]e conclude that the Commission acted beyond its lawful authority when it entertained the belated petition for reconsideration."); *Metromedia, Inc.*, 56 FCC 2d 909 (1975) (Commission may not waive 30 day filing period to accept a petition for reconsideration filed one day late); *see also Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (Com. Car. Bur. 1988). The courts have held that the Commission may not accept untimely reconsideration petitions in the absence of extremely unusual circumstances. *See, e.g., Virginia Islands Tel. Corp. v. FCC*, 989 F.2d 1231, 1237 (D.C. Cir. 1993).

legal consequence only where the delay in notification in fact makes it impossible reasonably for a party to comply with the filing deadline. When such defective notice allegedly occurs, the petitioner has the burden to show: (a) when and how he received notice in fact of the action complained of; (b) that the time remaining was inadequate to allow him reasonably to meet the 30-day requirement of § 405; and (c) that he moved for reconsideration promptly on receiving actual notice. *Gardner v. FCC,* 530 F.2d at 1091-92, n.24. As the Court of Appeals recognized, because interested parties often receive actual notice of decisions or rulings before the official letter arrives from the agency's secretary, "it will be an extraordinary case . . . where a petitioner can meet that burden." *Id.*

205. The strict conditions required by *Gardner* to justify acceptance of late-filed petitions for reconsideration are not presented in this case.[339] Most of the untimely petitioners maintain that the late-filed petitions must be considered because the Commission mailed the return notification letters to the applicants and not to the contact representative listed in their applications.[340] We disagree. Even when the applicant has designated a contact representative, our rules do not prohibit Commission staff from notifying the applicant directly of an action taken on its application. *See, e.g.,* 47 C.F.R. § 1.47(d). Petitioners assert, with no legal support, that Item 32 of the application form specifically requires the Commission to deal with the designated contact representative and not the applicant. However, the language at Item 32 in Form 494 does not compel the Commission to forward notification of Commission action to the contact representative's address in lieu of the last known address of the applicant as listed in the application, particularly when the applicant fails to clearly and explicitly request that all correspondence be mailed to someone other than the applicant.

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[339] The untimely petitioners' names and file numbers are listed in Appendix A. These untimely petitions were filed between 1 and 594 days late. While some of the petitioners attempt to cure their untimeliness by referring to an earlier, timely filed petition, in most cases no earlier petition was ever received by the Commission for any of the applicants proposing that transmitter site, despite their claims to the contrary. In all other instances, the earlier petition for reconsideration was filed on behalf of a different applicant.

[340] The petitioners cite *McElroy Electronics v. FCC*, 990 F.2d 1351 (D.C. Cir. 1993) to support their assertion that in failing to mail the return notification letters to the contact representative, the Commission created the possibility of insufficient notice, which requires acceptance of the late-filed petitions. *McElroy Electronics* does not address the burdens petitioners must meet before their late-filed petitions can be accepted. Instead, in that case the D.C. Circuit ruled that a lack of clarity in language in a rulemaking order afforded insufficient notice of a filing requirement, and required reinstatement of applications that had failed to comply with those filing requirements. *Id.* at 1363-64. No statutory filing period was involved.

206. More importantly, petitioners offer no evidence that the absence of service on a designated contact representative had any bearing on the petitioners' ability to timely file petitions for reconsideration. Petitioners do not allege that the Commission failed to provide the *applicants* with actual, personal notice of the Commission's return action in a timely manner.[341] In each instance where the untimely petitioners complain that the contact representative was not served, the Commission mailed the return notification letters to the last known address of the applicant, or to the last known addresses of both the applicant and the contact representative.[342] Petitioners then had the burden of notifying their contact representative of the return action or taking other appropriate action to ensure timely response to Commission correspondence.[343] Any delay experienced by the contact representatives in receiving notice of the Commission's

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[341] **While some petitioners attach letters from two San Diego, Texas applicants alleging that the correct applications were not attached to the return notification letters which they timely received, as "evidence of the difficulties applicants have been experiencing in timely receiving Commission return notifications, as well as applications they filed which are being returned. . .", petitioners fail to show how the San Diego applicants' failure to receive a copy of their applications impacted other returned applicants' ability to file a timely petition. Petitioners present no evidence that they themselves did not receive a copy of the returned application with the return letter and fail to present a nexus between the failure to receive a copy of the application with a return letter and an inability to file a timely petition for reconsideration. These petitioners have offered no persuasive evidence showing that they experienced any delay whatsoever in receiving the return notification letters relating to their own applications.**

[342] **In *Denver MDS Co.*, 62 Rad. Reg. 2d 104, 106 (1987), we upheld the cancellation of an MDS construction permit for failure to construct, despite the permittee's claim that it failed to receive the permit, noting that "[t]he Commission has held repeatedly that an item mailed is presumed to be received by the addressee." The Commission also has refused to excuse the untimely filing of petitions attributable to delays experienced in the course of forwarding mail or because of a change in address. *See Dan J. McLean*, 9 FCC Rcd 1902 (Field Oper. Bur. 1994); *Multi-Point Television Distributors, Inc.*, 5 FCC Rcd 519 (Com. Car. Bur. 1990); *Cheyenne Corporation*, 8 FCC Rcd 7049 (Dom. Fac. Div. 1993).**

[343] **We note that in a few instances, the contact representative filed a timely reconsideration petition for his own returned application initially prepared and submitted by the contact representative, while petitions were filed months later for applications initially prepared and submitted by the same contact representative for the same transmitter site and which were returned on the same day as the application of the contact representative. See n. 159, *supra*. We have repeatedly refused to "excuse an applicant's failure to comply with its rules where non-compliance was due to the negligence of counsel or other professional consultants." *New Channels Communications, Inc.*, 57 Rad. Reg. 2d 1600, 1602 (1985).**

return action from the petitioners cannot excuse the untimeliness of the petitions for reconsideration. We conclude that the Commission met its obligations under the Rules and the Administrative Procedure Act § 555(e), 5 U.S.C. § 555(e) (1988), and provided adequate notice of its action, by mailing the applicants written notice of the Commission's return action.

207. The petitioners in Hamburg, Belen and Cullman, and some of the petitioners for applications on the E channel group at Cape Girardeau, Missouri, offer a different explanation for their untimeliness. These petitioners allege that the contact representative did not receive the return notification letters until 24, 41, 84, and 152 days *after* the date of the return letters, respectively. The only supporting information offered is a declaration, under penalty of perjury, by either a secretary employed by the contact representative, or a manager of another company, stating when *she* "discovered" or "received" the letters.[344] The declarations do not state when the letters were actually delivered by the postal service, and no information is provided regarding routine office practice regarding mail handling or when the contact representative received notice of the returned applications.[345] Nor do petitioners offer any support for their speculation that possible misdating by the Commission may have contributed to the purported delay. Such bare proof does not meet the stringent burden placed on a late petitioner

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[344] The declaration attached to the Cape Girardeau petitions states that the secretary "discovered on September 29, 1992 an envelope, addressed to Micromedia as the authorized representative of this applicant, which contained MMDS Application Return Notification letters dated May 1, 1992 . . ." The declarant then concludes that "Micromedia has received several other such FCC return notifications dated months before actual receipt by Micromedia . . . and I have no reason to believe the same delay in receipt did not occur in this instance with respect to this Cape Girardeau, Missouri application." The Hamburg declaration states only that the secretary " . . . received on July 15, 1992 an envelope with the [Commission's] return address, addressed to Micromedia Development Services, Inc., which upon opening that day, contained MMDS Applications Return Notification letters dated June 20, 1992 for the MMDS E and F groups for Hamburg, Arkansas." The Cullman declaration is identical in form to the Hamburg declaration, and states that the secretary "received on September 22, 1992 an envelope" which contained return letters "dated June 30, 1992 for the MMDS E and F groups for Cullman, Alabama." The Belen declaration states that "the undersigned, a manager of Comcor (Suite 800 Associates) contracted by MicroMedia Development Service, Inc. . . . received from the [Commission] on July 8, 1992 MMDS Application Return Notification letters dated May 28, 1992 for the MMDS E and F groups for Belen, New Mexico."

[345] We note that the Cullman and Cape Girardeau return letters were addressed and sent to the individual applicants as well. Petitioners do not claim that *they* failed to receive the letters in timely fashion.

by *Gardner.*

208. In addition, the petitioners in these markets offer no explanation of why they waited between 14 and 26 days after their contact representative allegedly received the return letters to file their petitions for reconsideration.[346] They contend, instead, that they had thirty days from the alleged date of receipt of the return letters for filing their petitions for reconsideration. This contention is incorrect. When Commission action is taken by documents mailed to the affected parties, the Commission consistently has interpreted the date of public notice, for purposes of commencing the thirty day period for seeking reconsideration, to be the mailing date, and not the date of receipt. *See Public Communicators, Inc.*, 54 FCC 2d 390, 393 (1975). Section 1.4(b)(5) of our rules, 47 C.F.R. § 1.4(b)(5), expressly provides that when agency action is taken by mailing a document to the affected parties, the date of "public notice," for purposes of commencing the statutory period for seeking reconsideration, is "the date appearing on the document sent (e.g., mailed)." A more lenient rule, relying on the date of receipt of the document, "would expose all parties [affected by letter decisions] to the vagaries of mail deliveries and contentions of nondelivery. . . ." *Public Communicators*, 54 FCC 2d at 393. *See also Metromedia, Inc.*, 56 FCC 2d 909. 910, n.3 (1975) ("The Commission . . . wishes in the public interest, to avoid a myriad of problems involved in a system of computation based upon actual service of Commission orders on petitioners.")

209. Petitioners reliance on *Microwave Communications, Inc. v. FCC*, 515 F.2d 385 (D.C. Cir. 1974), to support their contention that the 30-day statutory period begins upon receipt of notice is misplaced.[347] The issue addressed in that case was whether the statutory filing period for seeking judicial review of a Commission action commenced with the release of the Commission decision or with the release of a news report summarizing the decision. The Court, relying in part on the Commission's own procedural rules interpreting the statutory term "public notice," determined that the statutory period for seeking review commenced when the full text was released, rather than when a brief news report summarizing the decision was issued. *Id.* at 394-396. Where, as here, no document is released, and the full text of the decision is contained in the document mailed to the parties, the date the document is mailed is tantamount to

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[346] The seven or eight page petitions filed for the returned Cullman, Hamburg, Belen and Cape Girardeau applications were virtually identical to petitions filed by the same attorney months earlier for other returned MMDS applications. No additional engineering materials were submitted with the petitions.

[347] Petitioners allege that "Petitions for Reconsideration must generally be filed 30 days from date of Public Notice. . . . In cases where, as here, no Public Notice is given, generally the release date tolls the 30 day period. However, the statutory language strongly suggests that 'public notice' of an order 'is given' only when the decision becomes *available* to the litigants. *MCI v. FCC.* . . . "

the release date on a formal decision. Thus, the Commission's longstanding interpretation that the period for filing petitions for reconsideration commences from the date a document is mailed, and not the date it is received, was not altered by the Court's decision in *Microwave Communications*. *See Public Communicators*, 54 FCC 2d at 393. Petitioners' reliance on *Food and Beverages Trade Dept., AFL-CIO*, 47 Rad. Reg. 2d 383 (1980), is also misplaced. That decision does not *require* the Commission to accept petitions where there is a defect in mailing notification (which did not occur here, in any case), but merely recognizes that the Commission may do so, in the "extraordinary case," pursuant to the test established in *Gardner*. *Id.* at 384.

210. Due to these applicants' failure to comply with 47 U.S.C. § 405, the untimely petitions for reconsideration listed in Appendix A will be dismissed as procedurally defective. We note, however, that even if we were to consider the merits of the arguments raised in the untimely petitions for reconsideration, we would still deny those petitions for the reasons discussed below.

211. Mutual Exclusivity and Cut-off. Based upon our review of the returned applications and publicly available information regarding authorized MMDS stations and pending applications, we conclude that the petitioned applications were untimely filed with respect to authorized stations or previously filed applications with which the returned applications were mutually exclusive. The determining factors we used to ascertain if the above-referenced MMDS applications were mutually exclusive pursuant to § 21.31(a) were whether the applications were filed: (1) within 50 miles of an authorized or previously proposed MMDS station;[348] (2) within the radio horizon (with an unobstructed electrical path) of the protected service area of an authorized or previously proposed MMDS station;[349] or (3) within an MSA, or its 15-mile buffer zone, for which there is an authorized or previously proposed MMDS station.[350] Each of these returned applications propose a transmitter site which made the proposed stations mutually exclusive, pursuant to §§ 21.31 or 21.914, with authorized or previously proposed MMDS stations. *See* ¶¶ 3-5, *supra*. Specifically, these returned applications were either mutually exclusive and cut-off with respect to: (1) a 1983 pending application or authorized station (for which the cut-off date was September 9, 1983); or (2) a post-1983 pending application or authorized station, which had a cut-off date prior to the filing date of the returned application.[351] Thus, the above-referenced applications

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[348] *MDS Allocation Order*, 45 FCC 2d at 620-21.

[349] *MMDS Technical Order*, 98 FCC at 109-111.

[350] *MMDS Allocation Order*, 94 FCC 2d at 1262-64.

[351] **Of these 4,330 returned applications, each was mutually exclusive and cut-off by previously filed MDS applications, with a cut-off date of September 9, 1983, except for: (1) one returned application at Lamar, Colorado; (2) 35 returned applications at**

were properly returned as unacceptable for filing pursuant to § 21.31(d), which states:

> An application otherwise mutually exclusive with one [or] more previously filed applications, but filed after the appropriate date prescribed in paragraph (b)(2) of this section, will be returned without prejudice and will be eligible for refiling only after final action is taken by the Commission with respect to the previously filed application (or applications).

47 C.F.R. § 21.31(d).

212. We reject the contention of some petitioners that because the applications they filed for each community were filed on the same date as all other applications for that community, their applications could not have been filed past the cut-off period established in §§ 21.31 or 21.914. Whether an MDS application is cut-off is not determined solely by the date of filing *vis-a-vis* applications specifying the same transmitter site and proposing service to the same community, but also by: (1) whether, pursuant to 47 C.F.R. § 21.31, granting the application would result in harmful interference to any previously proposed or authorized station for which the cut-off date is past; or (2) whether, pursuant to 47 C.F.R. § 21.901(d)(5), the application proposes a transmitter site that is within or within 15 miles of the borders of an MSA, which has a previously proposed or authorized station for which the cut-off date is past. *See* ¶¶ 3-5, *supra*. As explained above, the above-referenced applications were cut-off by mutually exclusive, previously proposed or authorized stations which, although they specified cities different than the cities specified by the returned applications, would have received harmful interference from the stations proposed in the returned applications.

213. Interference Protection. At the very inception of MDS, the Commission established the principle that subsequently filed applications must not cause harmful interference to any previously proposed or authorized MDS station. "Of course, the

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Kellogg, Idaho on the E channels; (3) 31 returned applications at Liberal, Kansas; and (4) 84 returned applications at Maysville, Kentucky. Instead, the Lamar application was mutually exclusive and cut-off by applications filed October 24, 1990 for Lamar, with a public notice date of September 27, 1991, including authorized station WMX203. The Kellogg applications on the E channels were mutually exclusive and cut-off by applications filed on December 6, 1991 for Kellogg, with a public notice date of July 1, 1992, including authorized station WMI349. The Liberal applications were mutually exclusive and cut-off by applications filed on November 5, 1990 for Guymon, Oklahoma, with a public notice date of October 23, 1991. The Maysville applications were mutually exclusive and cut-off by applications filed on November 8, 1991 for Cherry Forks, Ohio, with a public notice date of July 8, 1992. Thus, in a *de novo* review, we have determined that each of the 4,330 returned applications was mutually exclusive and cut-off by an authorized station or previously filed application.

applicant for the second channel sought will be expected to demonstrate that his system is designed so that significant interference will not occur with respect to the first MDS channel. . . ." *MDS Allocation Order*, 45 FCC 2d at 621. Almost ten years before the above-referenced applications were filed, the Commission explained its emphasis on this requirement for MDS applications:

> It is possible for co-channel interference generated by one MDS station to cause unacceptable distortion of another station's signal from as far away as 50 miles. Section 21.90[2](c) of our Rules therefore requires an MDS application to include an interference study containing an analysis of the potential for harmful interference with other MDS stations located within a 50 mile radius of the proposed station.

R.L. Mohr, 85 FCC 2d 596, 606 (1981).[352] We have also recognized that "the demonstration of interference protection, at the time of filing, aids the Commission in the public interest determination that an applicant is technically qualified to be an MDS/MMDS licensee." *Family Entertainment Network, Inc.*, 9 FCC Rcd 566, 567-68, n. 10 (Dom. Fac. Div. 1994). Thus, § 21.902(b) requires all MDS applicants and licensees to provide 45 dB of cochannel interference protection and 0 dB of adjacent channel interference protection,[353] and to demonstrate that protection in interference studies submitted with the applications.

214. Petitioners' applications failed to demonstrate a lack of harmful interference to existing MMDS and ITFS licensees and to previously proposed MMDS applicants.

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[352] The distance was extended in 1984 to the radio horizon with an unobstructed electrical path of the applicant's MDS station. *MDS Technical Order*, 98 FCC 2d at 111. Subsequent to the filing of the last of these 4,330 returned applications, the distance was extended to 100 miles. *Amendment of Parts 1, 2 and 21 of the Commission's Rules*, 8 FCC Rcd 1444, 1448 (1993).

[353] We have consistently required MDS applicants to comply with § 21.902(b). In the *Family Entertainment* case, we returned as unacceptable for filing an application which demonstrated that the level of interference was within 0.16 dB of meeting the 45 dB cochannel standard. In so doing, we stated that:

> [W]e reject FEN's claim that its applications should be granted because the level of interference . . . is *de minimis*. Section 21.902(b)(3) requires that an applicant demonstrate 45 dB of cochannel interference protection. In this rule provision, no reference is made to qualifying terms, degrees or levels, other than 45 dB at which interference would be deemed acceptable.

9 FCC Rcd at 568.

As discussed in Section II, *supra*, applicants for new MDS stations on the E or F channels are required to file specific technical interference protection showings for cochannel and adjacent channel stations. These interference showings are a significant requirement because the Commission, in reallocating the E and F channels from ITFS to MDS, did so with the understanding that certain adjacent channel interference problems might arise. The Commission also anticipated that some authorized cochannel stations would be spaced more closely than ordinarily allowed and require careful planning and engineering. *MMDS Allocation Order*, 94 FCC 2d at 1246, 1264. Thus, the Commission stressed that "we expect applicants to address this problem in their applications. Those applications that do not contain an analysis of how the applicant intends to avoid cochannel interference in adjacent areas will not be considered acceptable for filing." *Id.* at 1264. *See also* § 21.902(b) and (c). Consequently, there have been a series of cases emphasizing the importance of interference protection showings in MDS applications for the E or F channels.[354]

215. In many instances, petitioners failed to file and serve *any* interference analyses for existing or previously proposed MDS stations with transmitter sites within 50 miles or the radio horizon with an unobstructed electrical path of the applicants' proposed stations and for ITFS stations with transmitter sites within 50 miles. *See, e.g.*, ¶¶ 46, 50 and 74, *supra*. Our analysis of the interference statements actually submitted shows that petitioners' applications failed, *inter alia*, to provide at least 45 dB of cochannel interference protection or at least 0 dB of adjacent channel interference protection as required by § 21.902(b); failed to submit free space calculations of the desired to undesired signal ratios to each reference receiving antenna within the

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[354] *See, e.g., New Channels Communications, Inc.*, 57 Rad. Reg. 2d 1600, 1602 (1985) ("In our view, an MDS application which does not contain the important and essential technical showing required by § 21.902(c) cannot be characterized as complete, or in substantial compliance with the Commission's rules and regulations, as required by the criteria for acceptability outlined in rule § 21.20(a)."); *CNI Wireless, Inc.*, 9 FCC Rcd 2039, 2040 (Dom. Fac. Div. 1994) ("Section 21.902(c)(2) requires that an applicant initially file with the application analysis of the potential for harmful interference with any authorized or previously proposed adjacent channel stations within the radio horizon of the applicant's proposed transmitting antenna. . . . [B]ased upon CNI's failure to comply with Section 21.902, the Division's finding, that CNI's application was defective and unacceptable for filing, was proper."); *G.C. Cooper*, 8 FCC Rcd 7007, n. 9 (Dom. Fac. Div. 1993) ("[T]he standard for evaluating applications under Part 21 of the rules is not 'substantial completeness' but rather 'acceptability for filing'. . . . Cooper's application was properly returned as unacceptable for filing. . . for failure to include the technical showing required. . . . "); *Marylan J. Benson*, 7 FCC Rcd 4668 (Dom. Fac. Div. 1992) ("[T]hose applications that do not contain an analysis of how the applicant intends to avoid cochannel interference in adjacent areas will not be considered acceptable . . . . This interference protection showing is a significant requirement. . . . ")

protected service area of the previously proposed stations as required by § 21.902(f); failed to demonstrate terrain blockage (*see* § 21.902(d)); used incorrect methodology in performing the interference study (*see* Section 21.902(d)); and contained incorrect technical specifications for the petitioner's station or the previously proposed station. *See Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713, 5716-17 (1987) ("Coordination of MDS . . . systems . . . relies on accurate data about the interference environment.") Thus, these applications were properly returned as unacceptable for filing. *See MMDS Technical Order*, 98 FCC 2d at 93 ("An application that proposes cochannel or adjacent channel operation and does not contain a showing that the proposed operation will not cause harmful interference as described herein will not be accepted for filing."); *see also Family Entertainment,* 9 FCC Rcd at 567 ("[T]he filing of an interference analysis, which demonstrates lack of harmful interference, is considered a basic requirement in determining the acceptability of an application."); *Dan S. Bagley, Jr.*, 7 FCC Rcd 4002, 4003 (Dom. Fac. Div. 1992) ("In the processing of MDS station applications, the interference analyses required by [§ 21.902] are crucial.")

216. We reject petitioners' claims that they were only required to perform interference analyses for applications which had been placed on public notice. Section 21.902(c) requires an MDS applicant to file interference studies for specified "authorized or previously-proposed, cochannel and adjacent-channel, stations. . . ." The rule does not excuse applicants from submitting interference studies unless or until the previously proposed applications have been placed on public notice. In addition, petitioners' claim that they were unable to perform interference analyses for applications which had not been placed on public notice because "files for these stations were not available for public inspection" is factually incorrect.[355] While there have been periods of time when

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[355] The March 22, 1993 Engineering Statement attached to many of the petitions for reconsideration states that:

> The interference analysis took into account existing or previously proposed co-channel and adjacent channel stations, including those that appeared on the FCC inventory list. *However, interference analysis could only be performed with respect to stations that had appeared on FCC public notice. Interference analyses could not be [per]formed with stations which had not yet appeared on public notice since files for these stations were not available for public inspection.* These stations were, however, considered during the search for unserved communities to make sure that a site would not be placed in a previously applied for community.

(emphasis added). The exhibit to most of petitioners' applications titled "Exhibit E, Interference Analysis (Per Section 21.901 & 21.902)" includes the following language:

> [The applicant] acknowledges that there are other previously proposed co-channel and adjacent channel stations that have not yet appeared on FCC Public Notice

newly-filed MDS applications have not been available for public inspection through the Domestic Facilities Division Public Reference Room, copies of these applications have been available since at least 1988 from the Commission's public record copy contractor, irrespective of whether the applications had been placed on public notice.[356] *See 1988 Public Notice*, 3 FCC Rcd at 2663. In addition, as early as November, 1990, before any of these returned applications were filed, a "read-only" copy of the MDS database was available to the public through a third party public access contractor.[357] Finally, contrary to the claims in the applications and petitions, the returned applications also lacked interference analyses for applications which had been placed on public notice prior to the filing date of the petitioners' applications. Thus, we reject petitioners' claim that their failure to file interference studies was somehow caused by the Commission's policies regarding access to applications.

217. Petitioners also argue that it was wrong for the Commission to return their applications for failure to submit and serve interference analyses, because "the Commission itself waived the requirements of Section 21.902(c) for applicants at the time of filing. . .", citing *Donald E. Benson*, 8 FCC Rcd 1872 (Dom. Fac. Div. 1993). Petitioners' reliance on that decision is misplaced. In *Benson*, the staff affirmed the return of Benson's 1983 MDS applications for failure to file technical showings with his

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> and files for these stations are not available to the public, which limits the ability to conduct an interference analysis with these stations. Applicant has designed the proposed station conservatively and believes that it will be able to protect all known stations (as they appear on the latest FCC inventory list) within 50 miles radius and, will amend its application to include these stations when records are made available to the public.

Even though the engineering statements admit that interference studies could be submitted for applications placed on public notice, we note again that contrary to the claims in the applications and in the petitions, the returned applications failed to submit interference analyses for applications which had been placed on public notice prior to the filing date of the petitioners' applications. *See, e.g.*, nn. 264 and 290, *supra*.

[356] A printed inventory of all active MMDS applications filed with the Commission has always been available for public inspection. This lists, for each application, the applicant's name, the city proposed to be served, the coordinates of the proposed transmitter site, public notice date, and the application status. From this listing, a potential applicant could identify proposed stations for which interference studies must be submitted, and order copies of the necessary applications from the Commission's copy contractor. Files for authorized stations have always been available for public inspection in the Domestic Facilities Division Public Reference Room.

[357] *See Public Notice: New Contractor for Online Public Access to Commission Data Bases*, Mimeo No. 10511 (Nov. 7, 1990).

application, as required by § 21.901(d)(7). *Id.* at 1873. The decision offers no support for petitioners here because Benson did not seek a waiver of the rules, but argued that two sentences contained in his applications met the requirements of § 21.901(d)(7). Moreover, Benson was not required to include the detailed interference showings required by § 21.902(c) with the applications. In the *MMDS Allocation Order*, we initially exempted all 1983 MMDS applications, such as Benson's, from the requirements of § 21.902(c), because all of the applications were filed on one day, September 9, 1983. The same rulemaking order, however, specifically ruled that applications filed after September 9, 1983 would be required to comply with Section 21.902(c). *MMDS Allocation Order*, 94 FCC 2d at 1265.

218. In addition, petitioners' assertions that they have committed to make every effort to avoid harmful interference to others and to cooperate in good faith should any interference occur in the future does not excuse their failure to submit detailed interference studies as required by § 21.902. *See, e.g., G.C. Cooper*, 8 FCC Rcd at 7008 ("An applicant's general statement that he would use 'all legitimate engineering techniques' does not constitute the kind of showing discussed in the *MMDS Allocation Order* and required under 47 C.F.R. § 21.901(d)(7).") The requirement of § 21.902(c) that an applicant submit interference analyses at the time its application is filed is separate from the requirement in § 21.902(a) that "[a]ll [MDS] applicants, permittees, and licensees shall make exceptional efforts to avoid harmful interference . . . and . . . are expected to cooperate fully in attempting to resolve problems of potential interference . . . ," and is also separate from the requirement in § 21.901(d)(7) that applicants submit a showing of how interference will be avoided and demonstrate what steps they have taken to comply with § 21.902(a). *See also* § 21.31. Nor do the applicants' offers to file curative amendments at some later time excuse them from submitting all required interference studies at the time the applications are initially filed. *See Marylan J. Benson*, 7 FCC Rcd at 4669, n. 9.[358] Based upon these considerations, we conclude that petitioners failed to comply with the technical requirements set forth in § 21.902 regarding interference protection and failed to demonstrate that the applicants are technically qualified to be an MDS licensee as required by § 21.900. Thus, these applications were properly returned as unacceptable for filing. *New Channels Communications, Inc.*, 57 Rad. Reg. 2d at 1602; *CNI Wireless, Inc.*, 9 FCC Rcd at 2040.

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[358] As discussed above, the returned applications failed to include interference studies even for previously filed applications which had been placed on public notice prior to petitioners' filing of their applications. While not affecting the outcome of our decision, we also note that while petitioners' applications were still pending, the staff continued processing previously filed applications and placing them on public notice. Despite the returned applicants' stated intention to amend their applications to file required interference analysis after pending applications were placed on public notice, no such amendments were ever filed on behalf of the returned applications.

219. Notice to Affected Parties. In addition, each applicant failed to serve, as required by § 21.902(g), all applicants, conditional licensees and licensees for stations required to be studied by § 21.902(c), thus depriving affected parties of notice and an opportunity to be heard. In *Edna Cornaggia*, 8 FCC Rcd 5442, 5444 (Dom. Fac. Div. 1993), the return of a modification application was upheld for failure to comply with § 21.902(g):

> **The Commission makes provision for actual notice and an opportunity to be heard by parties in interest by requiring at Section 21.902(g) that microwave stations that might be affected by operation of an MDS station be served a copy of the required interference analysis for their station. Cornaggia admittedly failed to properly serve VisionAire with a copy of the interference analysis . . . . Due to this lack of service, the orderly process contemplated in the Commission's rulemaking order, in which the Commission staff resolves interference problems after oppositions are filed, was negated.**

220. Location Requirements. The *1988 Public Notice* allows the filing of MDS applications on the E and F channels commencing April 20, 1988, *but only* for locations that are: (1) farther than 50 miles from the proposed location of an MMDS application pending on April 19, 1988 or an existing station; and (2) farther than 15 miles from the boundary of a statistical area for which there were applications pending on April 19, 1988 or an existing station. We explicitly stated in the first paragraph of the *Notice* that "[a]pplications filed must comply with the location restrictions contained in this Notice. We do not anticipate granting any waivers of this location requirement." *1988 Public Notice*, 3 FCC Rcd at 2661. We also emphasized twice that applications filed in violation of the location requirements would be returned as unacceptable for filing. *Id.* Despite these clear directives, virtually all of the above-referenced MMDS applications proposed a transmitter site in violation of the location restrictions of the *1988 Public Notice*. Therefore, these applicants submitted applications on dates not designated by the Commission for the filing of MDS applications.

221. Petitioners can claim no surprise concerning the important burden placed on applicants to carefully select the proposed location of an MDS station. In addition to the clear language in the *1988 Public Notice*, we stressed, as early as 1980, the importance of compliance with site selection requirements for MDS stations. In *R.L. Mohr*, 77 FCC 2d 30 (1980), we explained that "given the rather severe shortage of frequencies in these lower more desirable bands, . . . [t]o be able to use these frequencies [for MDS] imposes a cost, *a cost in terms of more careful engineering and site location,* and perhaps in use of more sophisticated equipment than would be otherwise required." *Id.* at 37 (emphasis added). Thus, petitioners had full notice of the necessity to comply with the location restrictions. Because petitioners chose to disregard the Commission's clear directive, their applications were properly returned as unacceptable for filing.

222. Waiver Requests. Although many of the returned applications did not

include a waiver request, petitioners assert that the applications contained all necessary elements for grant of waivers of the location restrictions contained in the *1988 Public Notice,* and thus, the Commission was required to grant such waivers. In addition, some petitioners assert that the Commission should waive its interference analyses filing requirement for certain types of applications. Section 21.20(c)(1) states that a defective application may still be accepted for filing if the application is accompanied by a waiver request. However, because many of the returned applications were not accompanied by a request for waiver, these applicants failed to meet the requirements of this rule.[359] In addition, for the reasons discussed below, we do not find that grant of the waivers would serve the public interest, and thus will not grant a waiver on our own motion pursuant to § 21.20(c)(2).[360]

223. Section 21.19 provides that applications seeking waiver of the Commission's rules must contain a statement of reasons sufficient to justify a waiver. A waiver will only be granted upon an affirmative showing that:

> (a) The underlying purpose of the rule will not be served, or would be frustrated, by its application in the particular case, and that grant of the waiver is otherwise in the public interest; or
> (b) The unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest. Applicants must also show the lack of a reasonable alternative.

"An applicant for waiver faces a high hurdle even at the starting gate. 'When an applicant seeks a waiver. . . it must plead with particularity the facts and circumstances which warrant such action.'" *Wait Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968) (per curiam)); *see also David Laustsen*, 3 FCC Rcd 2053, 2054 (Comm. Car. Bur. 1988) ("[A] request for waiver . . . must affirmatively demonstrate that application of the rules would frustrate the underlying purposes of the rule.")

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[359] None of the returned applications for Beloit, Alabama; Goshen, Alabama; Gurdon, Arkansas; Gunnison, Colorado; Thomaston, Georgia; Liberal, Kansas; Maysville, Kentucky; Lamoni, Iowa; Leesville, Louisiana; Big Rapids, Michigan; Newberry, Michigan; Cape Girardeau, Missouri; Midway, North Carolina; Ashley-Wishek, North Dakota; Coshocton, Ohio; Defiance, Ohio; Findlay, Ohio; Ridgeway, Pennsylvania; Oneida, Tennessee; Huntsville, Texas; Jasper, Texas; San Diego, Texas; Price, Utah; Richfield, Utah; Warsaw, Virginia; Petersburg, West Virginia; and Portage, Wisconsin were accompanied by waiver requests.

[360] The Commission may waive any rule or requirement on its own motion. *See* § 21.20(c)(2).

224. Petitioners assert that they are entitled to a waiver of the *1988 Public Notice* location requirements because the applications identified all stations within 50 miles of the applicants' proposed stations, and, given the distance between those identified stations and the applicants' proposed stations, no "realistic possibility of harmful interference" exists. However, the Commission already has determined that the "mileage between [MDS] stations is not the only factor that determines whether interference will occur." *MDS Technical Order*, 98 FCC 2d at 90. In 1984, the Commission adopted, at 47 C.F.R. § 21.902(f), the definition of harmful interference as a free space calculation of a specified desired to undesired signal ratio. *See MDS Technical Order*, 98 FCC 2d at 89-90. As shown in Section III, *supra*, each of the returned applicants failed to submit interference studies, as required by § 21.902, for all authorized or previously proposed MMDS stations within 50 miles of their proposed transmitter sites, and to demonstrate that the proposed station would not cause harmful interference. Indeed, in some applications petitioners failed to even *identify* the existing or previously proposed stations. Thus, their assertion that there is "no realistic possibility of harmful interference" to other existing or proposed stations is totally unsupported.[361] These wholly unsupported assertions fall far short of the stringent showing required by *WAIT Radio* of the existence of extraordinary or special circumstances justifying waiver.

225. Petitioners also assert, incorrectly, that the purpose of the location restrictions contained in the *1988 Public Notice* is "*solely* to avoid harmful interference." The location restrictions, however, serve other important administrative purposes which do not concern interference avoidance. The location restrictions also minimize the possibility for application gridlock, and allow us to process applications more expeditiously and to efficiently utilize scarce engineering resources. *See Boyd B. Hopkins, Sr.*, 9 FCC Rcd 569, 570 (Dom. Fac. Div. 1994); *R.L. Mohr*, 85 FCC 2d 596, 604 (1981). These purposes would not be served were we to routinely grant a waiver of the location restrictions to each and every applicant that demonstrated non-interference through the submission of interference studies. Thus, we conclude that granting petitioners' requested waivers would frustrate the underlying purpose of the *1988 Public Notice* location restrictions.

226. We also reject petitioners' assertion that the *1988 Public Notice* contemplated that waivers of the 50 mile location requirement would be routinely granted whenever an MMDS applicant "demonstrate[s] non-interference." The *Notice* states that the Commission did not anticipate granting waivers of the location restrictions. Petitioners' reliance on a subsequent paraphrase of § 21.20, the rule governing acceptability for filing, and language in the *Notice* reminding applicants that

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[361] A bald conclusion, without any offer of proof or documentary support, has no probative value in determining whether a proposed station would cause harmful interference. *Jim Bolton*, 2 FCC Rcd 3207 (Comm. Car. Bur. 1987).

they also must comply with the rules requiring the filing of interference studies for ITFS and MMDS authorized and proposed stations within 50 miles, as inviting applicants to file for waivers of the location requirement, is misplaced. The language referred to simply reminded interested parties that the imposition of additional location restrictions on post-1983 applicants did not exempt those applicants from the requirements to file both MMDS and ITFS interference studies, which were adopted in 1984 and are contained in §§ 21.901(d)(1), 21. 902(i) and 21.902(c). *See MDS Technical Order*, 98 FCC 2d 68 (1984).[362] This language did not explicitly or implicitly override the Commission's express warning that waivers of the location restrictions were not contemplated.

227. Petitioners cite *Austin Movie and Sports Cable, Inc.*, 4 FCC Rcd 6174 (Dom. Fac. Div. 1989), to support their position that the Commission should have granted a waiver of the location restrictions and accepted their applications for filing. *Austin Movie* is distinguishable from the instant case. In *Austin Movie*, the required interference analyses were filed with the application. The Commission granted the application, notwithstanding the potential for interference, based, in part, on the parties' stated willingness to comply with the § 21.902(a) mandate to resolve potential interference problems and on the imposition of several express conditions to ensure interference-free operation. *Id.* at 6176. Here, petitioners failed to submit the required analyses, and they have not presented any statements by previously proposed or authorized stations regarding their willingness to address potential interference problems. The fact that potentially affected parties have raised no objections, as petitioners claim here, is entitled to no weight when, in fact, most parties were never served with interference studies, and thus given no notice or opportunity to be heard. In addition, the application in *Austin Movie* was filed for Channel 2A, to which the *1988 Public Notice* is inapplicable. Thus, the additional consideration of whether the underlying purpose of the *Notice's* location restriction would be frustrated or whether there were any unique circumstances which would make the application of those restrictions unduly burdensome or unfair was not presented in that case. Petitioners also cite *Lawrence N. Brandt*, 7 FCC Rcd 4511 (Dom. Fac. Div. 1992), as supporting their waiver request. In *Brandt*, however, the applicant did not request a waiver and the decision does not discuss waiver issues. Instead, Brandt's filing was dismissed for failure

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[362] Petitioners contend their reading of the *1988 Public Notice* "comports with the FCC's recent proposal to replace interference analysis with rigid separation standards," citing *Notice of Proposed Rulemaking*, PR Docket No. 92-80, 7 FCC Rcd 3266 (1992). While the outcome of the cited rulemaking proceeding would have no effect on the filing requirements that existed at the time the above-referenced applications were filed, we note, in addition, that the Commission did not, as petitioners predicted, replace the interference criteria set forth in § 21.902 with preset distance separation standards. *Amendment of Parts 1, 2, and 21 of the Commission's Rules Governing the Use of the Frequencies in the 2.1 and 2.5 GHz Bands*, 8 FCC Rcd 1444, 1445 (1993).

to file interference studies pursuant to § 21.902. The decision specifically noted that due to Brandt's failure to include all required information concerning the potential for harmful interference, it was not necessary to address an affected party's argument that Brandt's filing also should be dismissed for failure to consider all previously filed MMDS applications within 50 miles. *Id.* at 4512.

228. Petitioners also claim that a waiver of the 50 mile location restrictions would be in the public interest because it would result in service to unserved communities, implying that the proposed communities can only be served from an MDS transmitter located within each community's borders.[363] We disagree. The Commission determined as early as 1973 that communities can be served, even when the transmitter is not located within the city limits of the specified community, by MDS stations located in nearby areas. In *Microband Corp. of America*, 41 FCC 2d 184 (1973), the Commission returned as unacceptable for filing an MDS application proposing a station at Newark, New Jersey as mutually exclusive and cut-off by a previously proposed New York City MDS application, despite the Newark applicant's claim that service to New Jersey would be precluded in violation of 47 U.S.C. § 307(b). In doing so we recognized that "the Newark-Elizabeth-Jersey City areas as a whole would be better served through a station located in New York City than through a . . . station located in Newark." *Id.* at 185-86.

229. Several petitioners allege that they are entitled to a waiver because they have submitted engineering statements demonstrating that there is no reasonable alternative site from which they could provide acceptable service to their specified communities that is located more than 50 miles from the sites of previously proposed or existing stations. The only support offered on that issue is an unverified statement by petitioners' engineering consultant, which asserts that:

> The proposed site was selected primarily because:
> a. The site was capable of serving the desired community.
> b. The site would not cause interference to any other station subscribers within their protected service area.
> c. As much as possible the site was the farthest away from all existing or proposed stations.
> d. The site was the only one available which met the above ... criteria.

These unsubstantiated assertions that the proposed transmitter site was the only suitable site available are not enough. An applicant must affirmatively demonstrate a lack of a reasonable alternative site. *See Orange Park Florida TV, Inc. v. FCC,* 811 F.2d 664, 669

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[363] While petitioners assert that their proposed community of license is unserved and has various unmet needs, they offer no documentary support for these assertions. Thus, petitioners have failed to "plead with particularity the facts and circumstances" warranting a waiver. *WAIT Radio*, 418 F.2d at 1157.

(D.C. Cir. 1987) (citations omitted) ("Commission precedent makes clear that an applicant seeking waiver of the minimum spacing rules must, as an initial matter, establish the nonavailability of fully-spaced sites . . . [Without such a showing, the applicant's] waiver request died, as it were, at the starting gate."). *See also Edna Cornaggia*, 8 FCC Rcd at 5444, n.6 ("Contrary to the assertion in the reconsideration petition that the Gary site . . . is the only possible site for this MMDS station, the [seven transmitter sites studied by the applicant] do not exhaust the numerous potential sites in the Chicago [CMSA] and its 15-mile buffer zone.").

230. Petitioners failed to present justification as to why their applications merit treatment different from that which we applied to thousands of other post-1983 MMDS applications. In view of these considerations, we do not find it would be in the public interest to grant a waiver of the location restrictions in the *1988 Public Notice*. Therefore, we conclude that petitioners' requests for waivers of the location requirements were properly denied.

231. Some of the petitioners also request that the Commission waive the requirement for submitting interference analyses for previously proposed stations which they characterize as "lottery losers." [364] To justify this waiver request, petitioners assert that enforcement of the interference protection requirements at the time their applications were filed would be unduly burdensome and a significant unnecessary expense, because lottery losers are unlikely to become licensees. We do not believe the facts and circumstances of this case are sufficiently unique so as to warrant a waiver.

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[364] It was recently reiterated that before filing their applications, MMDS applicants must consider *all previously proposed and pending* applications, including lottery-losing applications. *See CNI Wireless, Inc.*, 9 FCC Rcd at 2040; *Edna Cornaggia*, 8 FCC Rcd at 5443. Similarly, in *Roundtree Communications*, 7 FCC Rcd 5456 (1992), Roundtree argued that the dismissal of its application for a new H-channel station in the Private Operational-Fixed Microwave Service (OFS), for failure to file the required interference analysis for an application which was pending at the time Roundtree filed, but which was subsequently dismissed, was arbitrary and capricious. In upholding the dismissal of Roundtree's application we explained that:

> The Bureau's long-standing choice of the date of filing for this evaluation provides a standard that is known, certain, and fair to all interested parties. Roundtree's proposed alternative -- the date of Commission action -- varies from application to application, depending on staff resources, application backlogs, and other administrative considerations. To assess applicant rights and obligations under so variable a standard would indeed be arbitrary and capricious, with decisions made primarily on the basis of chance.

Id. at 5456 (citations omitted).

Most importantly, due to the procedures established for MDS lotteries, it is not unusual for an applicant that initially loses in a lottery to be selected in a later lottery for qualification review and to be subsequently granted. One of the underlying purposes of the interference analysis filing requirement is to avoid grant of an MDS application which would cause harmful interference to previously proposed, but subsequently authorized stations. *See* ¶¶ 5, 213, *supra.* Thus, if we granted petitioners' waiver request, we would effectively strip subsequently authorized MDS stations of the interference protection to which they are entitled pursuant to §§ 21.901(d)(7) and 21.902. Petitioners' statements that they are willing to cooperate with the new tentative selectee on problems of harmful interference in the event that any of the lottery losing applicants should become a tentative selectee does not address this underlying purpose, since all applicants are required by § 21.902(b) "to cooperate fully and in good faith to resolve interference . . . problems." Nor does it justify our treating these applicants differently from other MMDS applicants which have complied with the interference protection requirements in cases involving pending, lottery-losing applications. Therefore, petitioners' argument that enforcement of the requirement to demonstrate a lack of harmful interference and to serve a copy of the interference analysis on affected parties would be unduly burdensome and expensive is not persuasive. As the D.C. Circuit ruled in 1969, we neither "must or should tolerate evisceration of a rule by waivers." *WAIT Radio*, 418 F.2d at 1159.

232. Petitioners assert that the staff's disposition of their waiver requests by "the mere checking of two paragraphs on a form returning the application in question" cannot, on its face, meet the court-imposed requirement to give a "hard look" to waiver requests. However, the Court in *WAIT Radio* made clear that:

> The agency is not bound to process in depth what are only generalized pleas, a requirement that would condemn it to divert resources of time and personnel to hollow claims. The applicant for waiver must articulate a specific pleading, and adduce concrete support, preferably documentary. Even when an applicant complies with these rigorous requirements, the agency is not required to author an essay for the disposition of each application.

418 F.2d at 1157, n.9. Here, over two thousand applications did not even include a waiver request. Where the application did request a waiver, the request was of a general nature and lacked concrete, documentary support. Under these circumstances, and in light of the thousands of applications the staff was processing, the return notification letters indicating that the request was denied as failing to comply with § 21.19 of the Commission's rules were sufficient. Moreover, we have now reviewed the staff's denial of petitioners' waiver requests and have fully explained the basis for denying those requests.

233. In addition, even if the *1988 Public Notice* location restrictions had not prohibited the filing of the above-referenced applications, and we had granted a waiver

of the interference protection rules as to lottery-losing applicants, in each instance these applications still would have been returned as unacceptable for filing due to violations of other Commission rules in effect at the time the returned applications were filed, including filing after the relevant cut-off date of mutually exclusive applications and failing to submit adequate interference analyses for authorized stations or applications which could not be classified as "lottery losers." In fact, on reconsideration, petitioners in certain markets failed to address the fact that required interference analyses were omitted for: (1) 1983 authorized stations as close as 1.22 miles from the transmitter site proposed in the returned application; (2) post-1983 authorized stations as close as .16 of one mile; and (3) post-1983, previously proposed and pending applications as close as 1.15 miles.

234. Finally, we disagree with the petitioners' argument that we have changed the requirements, rules and standards applied to the returned applications and adopted more stringent separation standards *ex post facto* by refusing to grant the waivers and accept these applications for filing. As discussed at length above, the petitioners' applications were returned as unacceptable because they were filed after the relevant cut-off dates established in §§ 21.31 and 21.914 of the rules, and failed to submit and serve the required interference studies at the time the application was initially filed, as specified by § 21.902. *See Roundtree Communications*, 7 FCC Rcd 5456 (1992); *Boyd B. Hopkins, Sr.*, 9 FCC Rcd 569 (Dom. Fac. Div. 1994); *Edna Cornaggia*, 8 FCC Rcd 5442 (Dom. Fac. Div. 1993). All of the pertinent rules cited herein were long-established and applicable at the time the returned applications were filed.[365] All MDS applicants are charged with being familiar with Part 21 of the Commission's rules. Any applicant who "either ignores or fails to understand clear and valid rules of the Commission respecting the requirements for an application assumes the risk that the application will not be acceptable for filing." *Ranger v. FCC*, 294 F.2d 240, 242 (1961); *see also Donald E. Benson*, 8 FCC Rcd at 1873. Thus, we reject petitioners' claims that the Commission engaged in arbitrary and capricious action and find that "[t]he Division's return of [the above-referenced] applications . . . was not unreasonable or arbitrary, but rather was based on the [applicant's] failure to comply with Commission rules." *Family Entertainment*, 9 FCC Rcd at 568.

235. Sufficiency of Statement of Reasons for Return. Petitioners argue that the return letters failed to detail the reasons for the applications' return. However, § 21.20(a), which governs the disposition of defective applications, merely requires "a brief statement as to the omissions or discrepancies," not the breadth of detail demanded by the petitioners here. We find that the return notification letters sent to

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[365] For example, the interference study filing rule was adopted in a 1974 rulemaking order *(MDS Allocation Order*, 45 FCC 2d 616 (1974)) and the initial cut-off provisions of § 21.31 were adopted in 1968. *See Applications for Common Carrier Facilities*, 13 FCC 2d 415 (1968).

petitioners gave sufficient explanation of the reasons for the return of the applications. In each case, the return notification letters indicated at least one reason why the applications were unacceptable for filing, and cited the relevant rule section or Commission decision. Although a waiver request was not always involved in each return letter, we believe the same principle is determinative as was enunciated by the Court of Appeals in *WAIT Radio*. "[T]he agency is not required to author an essay for the disposition of each application." 418 F.2d at 1157, n.9. As discussed in Section III, *supra*, these petitioning applicants were afforded sufficient information to know that their applications were being returned due to defects specified in the return letters.

236. In particular, we reject petitioners' argument that the return of their applications was arbitrary and capricious because the return notification letters did not list which applications established the relevant cut-off date, thereby purportedly depriving petitioners of notice and an opportunity to challenge the qualifications of those previously filed applicants. For each of these returned applications, the applicant had a duty, prior to the filing of the application, to identify: (1) each cochannel and adjacent channel station within 50 miles or the radio horizon with an unobstructed electrical path of its proposed station and (2) the applicable MSA and its buffer zone, in order to fulfill the mandates of Sections 21.901 and 21.902. *See, e.g.*, § 21.902(a) - (d), (f), (i) - (k). Thus, petitioners should have discovered the authorized stations and previously filed applications with which they were mutually exclusive in the course of their research. [366] Given this pre-filing requirement to identify authorized and pending stations, petitioners fail to show how their right to challenge the qualifications of the previously proposed stations is somehow connected to the amount of information contained in an application return notification letter. In any event, we have now identified, in Section III herein, the authorized and previously proposed stations which petitioners were required to consider before filing their applications.

237. Petitioners also complain that the Commission's failure to individually identify all previously filed applications in the return letters resulted in a denial of their so-called "*Ashbacker* rights." *Ashbacker Radio Co. v. FCC*, 326 U.S. 327 (1945), does not confer any rights upon the petitioners here. In *Ashbacker*, the Supreme Court held that where two applications are mutually exclusive, the grant of one without a hearing on both deprives the loser of its right to a hearing pursuant to Section 309 of the Communications Act. The Supreme Court specifically noted, however, that both of the applications before it were "*bona fide*," or in compliance with Commission rules, and that neither had been cut-off. *Id.* at 333, n. 9. Here, the returned applicants fail to

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[366] As the Court of Appeals recognized in *Columbia Communications Corp. v. FCC*, 832 F.2d 189, 192 (D.C. Cir. 1987), "[t]he Commission staff must process annually thousands of applications. It cannot be expected to do research for applicants. . . . If the Commission staff were required to assume such a burden, little or nothing would be accomplished." (citing *Rio Grande Family Fellowship v. FCC*, 406 F.2d at 666).

comply in substantial part with Part 21 of the rules. In addition, the authorized stations and previously filed MMDS applications referred to in the return letters served to cut-off the returned applications. Addressing a similar argument, the Court of Appeals explained:

> ***Ashbacker*** **held that the Commission could not award a license without granting a timely competing applicant the comparative hearing required by its own rules.** ***Ashbacker*** **therefore simply is irrelevant to a situation where a license applicant complains that its application was not considered due to a 'regulation' that 'for orderly administration, requires an application. . . to be filed within a certain date.' . . . Only by compliance with such [cut-off] procedures may an application enter the ranks of '*bona fide* applications' protected by** ***Ashbacker.***

Maxcell Telecom Plus, Inc. v. FCC**, 815 F.2d 1551, 1561 (D.C. Cir. 1987) (citations omitted). Thus, petitioners have no "*Ashbacker* rights" *vis-a-vis* these previously proposed applications which had a cut-off date prior to the filing of the petitioned applications.**

238. In view of all of the foregoing considerations, we affirm the staff's return of the applications under consideration in this order. Reconsideration is not justified and reinstatement of the applications is not warranted.

239. Accordingly, IT IS ORDERED, that the untimely reconsideration petitions filed by the 2,355 applicants listed in Appendix A hereto, and the premature reconsideration petitions listed at nn. 58, 94, and 190, *supra*, ARE HEREBY DISMISSED, and that the reconsideration petitions filed by the remaining above-referenced applicants ARE HEREBY DENIED.

240. IT IS FURTHER ORDERED, that the staff of the Mass Media Bureau shall send copies of the decision to counsel for the petitioners by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A
Untimely Petitions for Reconsideration

BELOIT, ALABAMA

9201346 Richard Pankonien
9201347 Joseph Paulitsch
9201348 E.C. Crowther, Jr.
9201349 Ben D. Horton
9201350 Richard K. Stellfox
9201361 Elenor Stephen
9201362 C R & Mavis Rusch Prtnrs.
9201363 Noel Smith
9201364 Roger R. Flory
9201365 Marcelino L. Taboada
9201366 Judith A. McMillen
9201372 Dr. Frazier B.Todd Sr.PC
9201373 Judith A. Mcmillen
9201374 Roger R. Flory
9201375 Hollis D. Mitchell
9201376 Carlina Adkins
9201377 Ben D. Horton
9201378 Donald R. Toth
9201379 Raymond D. Cole
9201380 Mary J. Crowther
9201381 Harry E. Schorle
9201382 Bernard J. Letner
9201383 Richard K. Stellfox
9201384 April I & James E Warren
9201385 Wayne Lacourse
9201386 Robert M. Benson
9201387 R. Craig Brittain
9201388 John W & Velma J Snider
9201389 E.C. Crowther, Jr.
9201390 James G. Pyle
9201392 Stephen A. Stefan
9201418 David W Padgett
9201419 Richard J. Bare
9201420 Billy Ray Guinn
9201421 Jamie B Mattys
9201422 Eric L. Kudritzki
9201423 Paul F. Basile
9201424 D T Boisseau
9201425 Anthony D Litral
9201426 Billy G Alexander
9201427 Frances Yanus
9201428 Kevin & Barbara Lehner
9201429 Vincent M & Mary W Sykes
9201430 Gail T. Flesher
9201431 Dorothy M. Ward
9201432 David W Padgett
9201433 Elenor Stephen
9201434 David A. Greenberg
9201435 Kevin & Barbara Lehner
9201436 Thomas V Rossell
9201437 W.A. & N.M. Schutz Prtns.
9201438 Robert M. Benson
9201439 Dr Frazier B Todd Sr PC
9201440 Dorothy M. Ward
9201450 Morris Liechty
9201453 Marcelino L. Taboada
9201454 Betty Brown
9201455 Johnny & Tina Welborn
9201456 J.G. & H.R. England Part.
9201464 Carlina Adkins
9201465 Harry E. Schorle
9201466 Shirl Lynn Associates
9201475 April I & James E Warren
9201476 Billy Ray Guinn
9201477 John W & Velma J Snider
9201478 Robert W. Hollingsworth
9201479 J Kent & Donna B Wagstaf
9201480 Johnny & Tina Welborn
9201481 Gary C & Angela W Conner
9201482 A.H. & B.J. Ditmer, Part.
9201483 J.G. & H.R. England Part.
9201484 H.W. & L.C. Tegtmeier
9201485 Trent Associates
9201486 Nancy L. Mowery
9201487 C R & Mavis Rusch Prt.
9201488 Zimmerman, Russell D.
9201489 Hollis D. Mitchell
9201490 Gary C & Angela W Conner
9201491 Eric L. Kudritzki
9201492 Charles L Dixon
9201493 Bob & Mar. Towsley Ptrns.
9201494 Wayne Lacourse

APPENDIX A
Untimely Petitions for Reconsideration

BELOIT, ALABAMA, continued

9201495 Arthur L. Dalton
9201496 Kathryn S. Houston
9201497 Bernard J. Letner
9201498 Trent Associates
9201500 A.H. & B.J. Ditmer, Part.
9201501 Frances Yanus
9201502 H.W. & L.C. Tegtmeier
9201503 Paul F. Basile
9201504 R. Craig Brittain
9201505 Billy G Alexander
9201506 Robert W. Hollingsworth
9201507 Nancy L. Mower
9201508 Richard J. Bare
9201522 American Microtel, Inc.
9201530 Robert A. Kroll
9201531 Jamie B Mattys
9201532 H. Lee Trogdon
9201533 Elmer L. Stanley, Jr.
9201534 Mary J. Crowther
9201535 Joseph Paulitisch
9201536 Arthur L. Dalton
9201537 Richard Pankonien
9201538 Russell D.& Mary C. Webb
9201539 Bob & Mar. Towsley Ptnrs.
9201540 W.A. & N.W. Schutz Ptnrs.
9201541 Elmer L. Stanley, Jr.
9201542 David A Greenberg
9201543 Leslie J. Seid
9201544 Thomas V. Rossell
9201545 Russell D & Mary C Webb
9201546 Leslie J. Seid
9201555 Morris Leichty
9201556 Raymond D. Cole
9201558 D T Boisseau
9201576 Donald R. Toth
9201577 James G Pyle
9201578 Gail T. Flesher
9201579 H. Lee Trogdon
9201580 Vincent M & Mary W Sykes
9201581 J Kent & Donna B Wagstaf
9201582 Stephen A. Stefan
9201583 American Microtel, Inc.
9201602 Charles L Dixon
9201603 Robert A. Kroll
9201604 Kathryn S. Houston
9201605 Shirl Lynn Associates
9201606 Noel Smith
9201607 Betty Brown
9201618 Zimmerman, Russell D.

CULLMAN, ALABAMA

9252749 Charles R. Bartlett
9252750 Roger N. Bell
9252751 Elizabeth A. Struthers
9252752 Ronald M. Perry
9252753 Scott Hubbard
9252754 Jeffery C. Brenner
9252755 John D. Lowe
9252792 John H. Chase
9252793 Ronald A. Zielinski
9252794 J.E.& B. Jensen Ptnrs.
9252795 Noel Smith
9252796 Melvin A. Fox
9252797 Leonard S. Stokes
9252800 Elmer L. Stanley, Jr.
9252801 Elizabeth A Struthers
9252802 E.C. Crowther, Jr.
9252803 Dale E. Smith
9252804 Nancy L. Mowery
9252805 Arthur Dalton
9252806 Uayne Lacourse
9252807 Richard Busse
9252808 Robert Morrison
9252809 Jack G.& Heidi R. England
9252810 Raymond V. Tupper
9252811 Stephen C. Freeman
9252812 Amadeo Segura
9252813 Easter L & Jack A Bingham
9252814 William K. Miller
9252815 Roy G&Jan E Helton Ptnrs.
9252816 Stephen P. Petrick
9252817 Donald R. Toth

APPENDIX A
Untimely Petitions for Reconsideration

GOSHEN, ALABAMA

9200696 A.H. & B.J. Ditmer, Part.
9200697 Leona Carnline
9200698 E.C. Crowther, Jr.
9200699 Steve Skory
9200700 Donald R. Toth
9200701 James K. Keif
9200702 P.F. & L. M. Berry Prts.
9200703 Roger L. Scott Trust
9200704 David M. Dizon
9200705 Arthur L. Dalton
9200706 Alden D & Barbara B Reed
9200707 Gary T & Jodi Ann C Turn
9200712 Carolyn B. Leong
9200713 Edwin J & Margaret R Men
9200714 George E. Howard
9200715 Robert D. Dell
9200716 Steve Skory
9200717 David S. Murphy
9200718 Leonard S. Stokes
9200719 Emily R. Upham
9200720 Robert D. Dell
9200723 Ronald M. Laplume
9200724 Charles J. Zobel, Jr.
9200725 Eugene G. Lund
9200726 Leona Carnline
9200727 Marlis E. Smith
9200734 Richard St. Clair
9200735 Robert B. Kelly
9200736 John Gonsalves
9200737 Rodney W. Stelter
9200738 E.C. Crowther, Jr.
9200739 Stephen A. Stefan
9200740 Ann Q. & J.W. Blanton Jr
9200751 Chester Alan Kesler
9200752 Lawrence W. Rockwell
9200753 Catherine Demers
9200754 Roscoe M. Smith, Jr.
9200755 Alden D & Barbara B Reed
9200756 R.W. & N.L. Barron, Part.
9200757 Gary T & Jodi Ann C Turn
9200758 James K. Keif
9200759 Arthur L. Dalton
9200760 Lawrence W. Rockwell
9200761 Donald E. Phillips
9200793 Nancy J. Saxman
9200794 Ann Q. & J.W. Blanton Jr
9200795 Donald E. Phillips
9200796 George E. Howard
9200811 American Microtel, Inc.
9200812 Mary J. Crowther
9200813 Robert B. Kelly
9200821 Hubert P. Klein
9200822 Baron P. Hill
9200823 Robert M. Benson
9200825 George A. Elzer, Jr.
9200826 Noel Smith
9200827 Marlis E. Smith
9200828 Roscoe M. Smith, Jr
9200824 Baron P. Hill
9300829 AMT Incentives, Inc.
9200830 American Microtel, Inc.
9200841 Maurine D. Robertson
9200842 George A. Elzer, Jr.
9200843 Maurine D. Robertson
9200844 Leonard S. Stokes
9200845 Mary J. Crowther
9200846 Robert M. Benson
9200847 R.W. & N.L. Barron, Part.
9200848 Catherine Demers
9200849 David S. Murphy
9200850 Charles T. Smith, Jr.
9200752 Lawrence W. Rockwell
9200753 Catherine Demers
9200855 Carl D. & Elizabeth Frant
9200856 Charles T. Smith, Jr.
9200857 Edwin J & Margaret R Men
9200858 P F & L M Berry Partners
9200859 Rodney W. Stelter
9200860 John Gonsalves
9200861 Chester Alan Kesler
9200862 Noel Smith
9200863 Charles J. Zobel, Jr.
9200865 Nancy J. Saxman

APPENDIX A
Untimely Petitions for Reconsideration

GOSHEN, ALABAMA, continued

9200866 A.H. & B.J. Ditmer, Part.
9200867 Aleksander S. Lewicki
9200878 Carolyn B. Lelong
9200879 Carl D & Elizabeth Frant
9200880 Bruce T. Peacock
9200881 Roger L. Scott Trust
9200882 Bruce T. Peacock
9200883 Ronald M. Laplume
9200884 Eugene G. Lund
9200885 Richard St. Clair
9200886 Donald R. Toth
9200887 AMT Incentives, Inc.
9200888 David M. Dizon
9200889 Stephen A. Stefan
9200890 Hubert P. Klein
9200891 Aleksander S. Lewicki
9253235 Emily R. Upham

WILLCOX, ARIZONA

9160365 John Parolini
9160373 Lynnea Byland
9160379 Lynnea Byland
9160382 John Parolini

HAMBURG, ARKANSAS

9160677 Daniel Ferraro
9160678 Charles C. Davis
9160679 William E. Linn, Jr.
9160680 Frederick R. Cook
9160681 Charles C. Davis
9160682 Philip R. Danforth
9160683 Douglas P. Weber
9160684 William L. Westers
9160685 Noel Smith
9160686 Verne B. Maki
9160687 Robert M. Benson
9160688 Arthur L. Dalton
9160689 James Traicoff
9160690 John W. Cook
9160691 American Microtel, Inc.
9160692 Irwin, N.K. & S.D.
9160693 Jerome P. Sims
9160694 Daniel Ferraro
9160695 James C. Galbraith
9160696 Kaye Kinne Beal
9160697 Scott E. Schroeder
9160698 AMT Incentives, Inc.
9160699 Randall A. Lenz
9160700 Patricia M. Delovely
9160701 Jeffrey N. Jolcover
9160702 Daniel P. Walker
9160703 Donald C. Franks
9160704 Rick R. Larue
9160705 John D. Vodica, Jr.
9160706 Narayan Anand
9160707 William E. Linn, Jr.
9160708 Bruce T. Peacock

APPENDIX A
Untimely Petitions for Reconsideration

HAMBURG, ARKANSAS, continued

9160709 E. Kenneth James
9160710 Bruce Hansen
9160711 Arthur L. Dalton
9160712 Noel Smith
9160713 John W. Cook
9160714 Kaye Kinne Beal
9160715 Pauline T. Maniatis
9160716 Mark Ligas
9160717 Ned T. McCarty
9160718 Robert M. Benson
9160719 Philip R. Danforth
9160720 Irwin, N.K. & S.D.
9160721 Margaret Mildred Leach
9160722 John A. Ogurchak
9160723 Jerome P. Sims
9160724 James C. Gailbraith
9160725 James Traicoff
9160726 Daniel E. Moore
9160727 Kenneth S. Hughes
9160728 Michael D. Sellers
9160729 John F. Scritsmier
9160730 Jeffrey N. Jolcover
9160731 Randall A. Lenz
9160732 Narayan Anand

FORT. MORGAN, COLORADO

9161099 Barbara A. Stefan
9161100 Noel Smith
9161101 Michael J. Holst
9161104 Kenton D. Lippert
9161107 John R. Magel
9161108 John P. Ayres
9161109 John Neal Throckmorton
9161110 John D. Vodica, Jr.
9161112 Jan Balazik
9161114 Howard W. Tack
9161115 Howard Bialick
9161116 Gary S. Schultz
9161117 G. Robert Hanson
9161118 Frank S. Cotton
9161119 Frank N. Wisecup
9161120 Emily R. Upham
9161121 Dolores Harty
9161123 David Barr
9161124 Daniel P. Walker
9161126 Bowen Bo Wagner
9161127 Austin A. O'Dell, Jr.
9161128 Arthur L. Dalton
9161129 Andrew J. Miller
9161130 AMT Incentives, Inc.
9161131 American Microtel, Inc.
9161133 Tom Coslar
9161138 Russell L. Blaschke
9161139 Roscoe M. Smith, Jr.
9161141 Robin A. Manning
9161142 Robert M. Benson
9161143 Robert L. Pipkins, Jr.
9161146 Paul J. Sweeney
9161147 Paul B. Edmonds

GUNNISON, COLORADO

9157327 John M. Parolini
9157337 Arthur L. Dalton

LAMAR, COLORADO

9159581 Lynnea Byland

CROSS CITY, FLORIDA

9251874 Brian S. Hughes

THOMASTON, GEORGIA

9159504 Lynnea Byland

APPENDIX A
Untimely Petitions for Reconsideration

KELLOGG, IDAHO

9201351 Jack L. Hall
9201352 Jerry & Bonnie Mulalley
9201353 Roger Ralph & Kem Ralph
9201354 Lazarus Group Inc.
9201355 Shirley A. Peppler
9201356 Stanley Lawruk, Jr.
9201357 William C. Parsley
9201358 John B. Connaughton
9201359 Christopher H. Jones
9201360 R.R.& D.R. Kitchin Prtns.
9201405 Grayl D.& Naomi J. Reeves
9201406 R.R.&D.R. Kitchin Prtnrs.
9201407 Cleveland O'Neal, Jr.
9201408 Lazarus Group, Inc.
9201409 Annegret C. Topel
9201410 Felix M. Vela
9201411 Allen P. Ralph
9201412 Jack L. Hall
9201413 Cleveland O'Neal, Jr.
9201414 R.T. & J.E. Dishop Prtns.
9201415 Patrick J. Beckham
9201416 Arthur L. Dalton
9201417 Raymond M. Triber
9201457 Christopher H. Jones
9201458 American Microtel, Inc.
9201459 John B. Connaughton
9201460 Lamar E. Stevenson
9201461 Robert W. Stratton
9201467 Daphne Swanier
9201468 Donald R. Toth
9201509 Donald R. Toth
9201510 Thomas A. Turner
9201511 Allen P. Ralph
9201512 Annegret C. Topel
9201513 Mary T. Wears
9201514 Fred D. Adams
9201515 Perry W. Jenkins
9201516 Herb F & Joan E. Woods
9201517 J.C. Thames
9201518 Grayl D.& Naomi J. Reeves
9201523 Fred D. Adams
9201524 Cheri De Bonneville
9201525 Roger Ralph & Kem Ralph
9201526 Jerry & Bonnie Mulalley
9201527 Patrick J. Beckman
9201528 James M. Hiatt
9201529 Nancy Galasso
9201565 Arthur L. Dalton
9201566 R.T.&J.E.Dishop Ptrns.
9201567 Douglas B. Campbell, Jr.
9201608 Andrew A. Pastewski
9201609 Mary T. Wears
9201610 Shirley A. Peppler
9201611 William C. Parsley
9201612 Herb. F. & Joan E. Woods
9201613 Raymond M. Triber
9201614 Stanley Lawruk, Jr.
9201615 Thomas A. Turner
9201616 J.C. Thames
9201617 Perry W. Jenkins
9201619 Cheri De Bonneville
9201620 Felix M. Vela
9201621 Nancy Galasso
9201622 Robert W. Stratton
9201623 Daphne Swanier
9201624 Lamar E. Stevenson
9201625 American Microtel,Inc
9201627 Douglas B. Campbell, Jr.
9201628 James M. Hiatt
9201629 Andrew A. Pastewski

APPENDIX A
Untimely Petitions for Reconsideration

LIBERAL, KANSAS

9203433 Scott Frank
9203439 AA Alarm Co Inc.
9203440 Lomax Gwathmey
9203441 American Microtel, Inc.
9203442 Daniel&David Scherer Prt.
9203443 M.R. & D.E. Sherar Ptnr
9203444 Tracy Hollars
9203445 Billy G Alexander
9203446 Elizabeth Soto
9203447 Richard Montes
9203448 Merrill O. Bauer
9203449 R.H. Bedrossian
9203450 William R. Bone, Jr.
9203451 Richard Elander
9203452 Gene E. Ford
9203453 Richard Gordon
9203459 Dwight Maud
9203460 Russell E. Mckelvey, Jr.
9203476 Jeffery D Halsey
9203477 Manuel M Soto
9203479 Raymond W. Good
9203480 Maria Moreira
9203481 Andrew A Pastewski
9203482 Bruce T. Peacock
9203483 Lois Elander
9203484 Donald R. Toth
9203485 Leonard Warwick
9203486 Arthur L. Dalton
9203487 Douglas B. Campbell
9203488 Barbara Sharfstein
9203489 Norma Jean Shaw

LEESVILLE, LOUISIANA

9160130 Sandra J. Boyd
9160136 Keith M. Carpenter
9160138 Barton Thomas Center
9160139 John Carter
9160141 Kay Kinne Beal
9160142 John L. Robinson, Jr.
9160143 Cheryl Cervone
9160148 Bowen Bo Wagner
9160149 Edward W. Samoden
9160151 Lois Marie Riseling
9160152 Roger A. Thrush
9160153 Susan Kay Thrush
9160157 John B. Harris
9160168 Robert S. Beal
9160169 R. Trent Coleman
9160173 Donald F. Armstrong
9160176 Louis Pendleton
9160177 Lois Marie Riseling
9160178 Ronald J. Rider
9160183 Peggy S. Cantwell
9160184 B. Oreen Jackson
9160185 Brian E. Webb

APPENDIX A
Untimely Petitions for Reconsideration

LEESVILLE, LOUISIANA, continued

9260186 Verdia Howard
9160187 Ralph O. Berten
9160189 Robert D. Willock
9160190 Ronald J. Rider
9160193 Sandra J. Boyd
9160199 MBS Partners
9160201 Louis Pendleton
9160203 MBS Partners
9160204 Peggy S. Cantwell
9160215 Roger A. Thrush
9160216 Keith M. Carpenter
9160217 John L. Robinson, Jr.
9160218 Cheryl Cervone
9160223 Donald F. Armstrong
9160226 John Carter
9160227 Edward W. Samoden
9160228 Barton Thomas Center
9160229 Susan Kay Thrush
9160232 R. Trent Coleman
9160233 Robert S. Beal
9160237 Kay Kinne Beal
9160241 Ida Richard
9160242 Brian E. Webb
9160243 Ralph O. Berten
9160244 B. Oreen Jackson
9160245 Bowen Bo Wagner
9160248 John B. Harris
9160253 Dubel Partners
9160254 Robert D. Willock
9160255 Verdia Howard

RUSTON, LOUISIANA

9160273 Lois Webster Hough
9160274 Wayne H. Steeves
9160275 Nancy Freeman
9160276 Rosemary E. Bane
9160277 Laverne Guy
9160278 Lynette W. Wescott
9160279 Patricia C. Murphy
9160280 Jung & Salvato Partners
9160281 Darryl L. Harney
9160282 William Brooker
9160283 Dennis S. Aye
9160284 Peter H. Fein
9160285 Ruby Hamilton
9160286 Richard A. Kurtz, Part.
9160287 Melvin Leroy Collins
9160288 Milan Djokich Part.
9160289 Charles J. Munson Part.
9160290 Joseph P. Reitano
9160291 Lloyd F. Dow
9160292 Michael J. Holst
9160293 Don L. Ashley
9160294 Gerald Sherman
9160295 Mamorn Shishido
9160296 Mary N. Deberry
9160297 James R. Stratta
9160298 John H. Chase
9160299 John S. Burger
9160300 John Neal Throckmorton
9160301 Joyce Van Newkirk
9160302 Robert K. Wawrousek
9160303 Barton C. White
9160304 Richard H. Nejbauer II
9160305 Richard Losee
9160306 Stephen A Stefan
9160307 Keith M. Carpenter
9160308 Arnold Meiers
9160310 Eric J. Aubry, Sr.
9160311 Roger A. Thrush
9160312 Richard Blostic
9160313 J. Harold Smith
9160314 Susan Kay Thrush
9160315 Donald E. Phillips

APPENDIX A
Untimely Petitions for Reconsideration

RUSTON, LOUISIANA, continued

9160316 Lois Marie Riseling
9160317 Austin A. O'Dell, Jr.
9160318 Ida Richard
9160319 Drake D. Moser
9160320 Arthur L. Dalton
9160321 Robert M. Benson
9160322 Ronald L. Bond
9160323 Howard Bialick
9160324 George C. Brewer
9160325 Edwin E. Chapin
9160326 John B. Harris
9160327 E. Mignacco
9160328 Robert D. Willock
9160329 Bowen Bo Wagner
9160330 James J. Cassity
9160331 Ralph O. Berten
9160332 Frank E. Landeck
9160333 Patsy Parish McCurry
9160334 American Microtel, Inc.
9160335 AMT Incentives, Inc.
9160336 Richard A. Eyer
9160337 Gary M. Cirino
9160338 Noel Smith
9160339 Arnold Meirs
9160340 Richard H. Nejbauer
9160341 Richard Blostic
9160342 Joyce Van Newkirk
9160343 Joyce A. England
9160344 Eric J. Aubry, Sr.
9160345 Barton C. White
9160346 J. Harold Smith
9160347 Richard L. Losee
9160348 Patsy Parish McCurry
9160349 Robert K. Wawrousek
9160350 Susan Kay Thrush
9160351 Lois Marie Riseling
9160352 Roger A. Thrush
9160353 Ralph O. Berten
9160354 Ida Richard
9160355 Ronald L. Bond
9160356 John B. Harris
9160357 Richard A. Eyer
9160358 AMT Incentives, Inc.
9160359 American Microtel, Inc.
9160360 George C. Brewer
9160361 Frank E. Landeck
9160362 Robert D. Willock
9160393 Howard Bialick
9160394 Deming, Mignacco, Brooke
9160395 Robert M. Benson
9160396 James J. Cassity
9160397 Edwin E. Chapin
9160398 Gary M. Cirino
9160399 Stephen A. Stefan
9160400 Noel Smith
9160401 Arthur L. Dalton
9160402 Drake D. Moser
9160403 Bowen Bo Wagner
9160405 Jung & Salvato Partners
9160406 John Neal Thornton
9160407 Michael J. Holst
9160408 Darryl L. Harney
9160409 Peter H. Fein
9160410 Mamorn Shishido
9160411 Gerald Sherman
9160412 Joseph P. Reitano
9160413 Donald E. Phillips
9160414 Austin A. O'Dell, Jr.
9160415 Mary N. Deberry
9160416 Lloyd F. Dow
9160417 Patricia C. Murphy
9160418 Wiliam Brooker
9160419 Lois Webster Hough
9160420 John S. Burger
9160421 Dennis S. Aye
9160422 John H. Chase
9160423 Don L. Ashley
9160424 Nancy Freeman
9160425 Melvin Leroy Collins
9160426 Rosemary E. Bane
9160427 Lynette W. Wescott

APPENDIX A
Untimely Petitions for Reconsideration

RUSTON, LOUISIANA, continued

9160428 James R. Stratta
9160429 Keith M. Carpenter
9160430 Wayne H. Steeves
9160431 Richard A. Kurtz Part.
9160432 Laverne Guy
9160433 Milan Djokich Part.
9160434 Charles J. Munson Part.

ATHENS, MAINE

9201849 Arthur L. Dalton
9201850 American Microtel, Inc.
9201851 T.R. & B.J. Cadies Ptrn.
9201852 Charles R.Laura Wilson P.
9201853 David A.& Susan T.Jump P.
9201854 Robert L. Evans, Sr.
9201855 Richard P. Petruzzo
9201856 William R. Dickens
9201857 Gail M. Courcy
9201858 Ann E. Lessig & Phil Rich
9201870 Jeffery A. Fox
9201871 Donald R. Toth
9201872 Arthur L. Dalton
9201873 Francis B. Jacobs II
9201874 Kulvir K. Dhanda
9201875 Dennis V. Klima
9201876 William E. Henderson, Jr.
9201877 Jay T. Jackson
9201878 Billy G. Alexander
9201879 Roger W. Pottkotter
9201880 Harry V. Walton
9201881 Daniel Perdomo
9201882 Paul W. Duhon
9201883 James Mcelrath
9201884 Jeffery A. Fox
9201885 Dennis V. Klima
9201887 Francis B. Jacobs II
9201895 Bernard J. Letner
9201896 Robert Zelasko
9201897 Phillip D. Walker
9201898 Donald R. Toth
9201899 William Torabayashi
9201900 Harry V. Walton
9201901 Phat Peter Giang
9201902 Charles J. Smith
9201903 Steven C. Hancock
9201906 John & Cecilia S. Boesc
9201907 T.R. & B.J. Caddies
9201908 Phat Peter Giang
9201917 Kulvir K. Dhanda
9201918 Paul W. Duhon
9201982 Louise Pelo
9201983 Delmon E. Ison
9201984 CDB Enterprises Inc.
9210985 Ray & Ruth M. Ball Part.
9201986 Roy P. Ziganti, Jr.
9201987 Jay T. Jackson
9201998 William R. Boyce
9201999 T E Hutcheson& B Reynolds
9202000 John C & Cecilia S. Boesc
9202001 Willie G. Bandy
9202002 Kem Ralph
9202003 Billy G. Alexander
9202004 Robert M. Johnson
9202005 Joan M. Groshel
9202006 Roger W. Pottkotter
9202007 Daniel Perdomo
9202037 Joan M. Groshel
9202038 Robert L. Evans, Sr.
9202061 American Microtel, Inc.
9202062 Charles J. Smith
9202063 Bruce C. McClurg
9202065 Robert L. Budai
9202066 Beulah M Molle & Larry J.
9202067 Bruce C. McClurg
9202068 William E. Henderson, Jr.

APPENDIX A
Untimely Petitions for Reconsideration

ATHENS, MAINE, continued

9202069 Louise Pelo
9202070 David A & Susan T Jump P.
9202071 Beulah M Molle & Larry J
9202072 Ray E & Ruth M Ball Part.
9202087 Willie G. Bandy
9202088 Charles R. & Laura Wilson
9202089 Ann E. Lessig & Phil Rich
9202090 Gail M. Courcy
9202091 William R. Dickens
9202092 Richard P. Petruzzo
9202093 James Mcelrath
9202094 Delmon E. Ison
9202095 Robert M. Johnson
9202096 Robert Zelasko
9202097 CDB Enterprises Inc.
9202098 Roy P. Ziganti, Jr.
9202099 Phillip D. Walker
9202102 Steven C. Hancock
9202124 Robert L. Budai
9202125 William R. Boyce
9202126 Kem Ralph
9202127 Bernard J. Letner
9202128 T.E. Hutchinson
9202129 William Torabayashi

BIG RAPIDS, MICHIGAN

9161224 Gale B. King
9161231 John M. Parolini
9161235 Lynnea Byland
9161238 Paul A. Jarczyk

NEWBARRY, MICHIGAN

9204234 Merin Realty, Inc.

SPRING GROVE, MICHIGAN

9203947 Romulus Finley Hodges
9203948 Harvey Partnership
9203950 Martin Windom Prtnshp.
9203951 Samuel P. Vause
9203961 Frances W. Jordan
9203964 Frances W. Jordan
9203968 Frank J. Gezik
9203969 John L. West
9203970 Michael A. Moseley
9203972 John K. Grenga
9203973 John D. Jordan
9203974 D. Hope Pickett
9203976 Mary E. Vause
9204026 Warren L. Mabry
9204027 Rodney Carpenter
9204028 Mikeal A. Hardin
9204030 Thelma W. Lewis
9204031 St. Elmo Simms

APPENDIX A
Untimely Petitions for Reconsideration

SPRING GROVE, MICHIGAN, continued

9204032 Andrena L. Keesee
9204047 Charles L. Whetstone
9204049 Harley Ward
9204050 Dale Parham
9204051 Andrena L. Keesee
9204052 Thelma W. Lewis
9204053 Doris G. Epp
9204054 Edco Inc.
9204057 William B. Krag
9204058 DTO 61076 W Dewayne MCCA
9204059 Judy B. Hodges
9204060 Robert H. Machen, Jr.
9204061 Zonnie Jones, Jr.
9204062 Jones & Kennedy Partners
9204063 Mary E. Vause
9204066 John D. Jordan
9204072 Rodney Carpenter
9204083 Andrew J. Moseley, Jr.
9204084 Romulus Finley Hodges
9204085 Robert H. Machen, Sr.
9204086 Judy B. Hodges
9204088 Sloane Y. Mills
9204089 Mikeal A. Hardin
9204090 Darren S. Landry
9204092 Zonnie Jones, Jr.
9204108 Grace Ward
9204109 John K. Grenga
9204111 Len Cornett
9204112 Michael A. Moseley
9204113 Edco Inc.
9204114 Doris G. Epp
9204115 Marvin R. Epp
9204116 William J Finnigan
9204126 Frank J. Gezik
9204127 Robert H. Machen, Sr.
9204128 Warren L. Mabry
9204135 Martin Windom Prtnshp.
9204138 Timothy D. Jones
9204140 DTO 61076 W Dewayne MCCA
9204141 Paul R. Kennedy
9204143 Grace Ward
9204144 Len Cornett
9204145 Dale Parham
9204146 D. Hope Pickett
9204147 Andrew J. Mosely, Jr.
9204148 Harley Ward
9204149 Mary B. McCuen
9204150 Thomas J. Lawrence
9204151 Timothy D. Jones
9204153 Sloane Y. Mills
9204155 Jones & Kennedy Partners
9204158 Marvin R. Epp
9204160 St. Elmo Simms
9204161 Robert H. Machen, Jr.
9204162 Mary B. McCuen
9204165 Keith A. Weber
9204167 John L. West
9204168 Paul R. Kennedy
9204171 Charles L. Whetstone
9204172 Ladnier Partnership
9204173 Darren S. Landry
9204180 William B. Krag
9204182 Ladnier Partnership
9204183 Harvey Partnership
9204190 Keith A. Weber

VICKSBURG, MISSISSIPPI

9162176 Kenneth R. Longo
9162215 Jerome G. Quinn
9162216 Howard W. Packer
9162217 Janet Goodrich
9162218 Henry E. Sandau

APPENDIX A
Untimely Petitions for Reconsideration

WAYNESBORO, MISSISSIPPI

9202228	Donald J. Dusa and Joseph
9202232	Yahale Yadede
9202233	Dixie Cox
9202234	Johannes Floeck
9202236	Paul H. Tiffin
9202241	Ann P. Corcoran
9202242	Ann P. Corcoran
9202245	Joseph E. Gerace
9202246	M.P. & R.A. Peterson, Jr.
9202249	Samuel P. Vause
9202254	Marc E. Pequignot
9202256	Neal Lespasio Jr.
9202273	Jane A. Bennett
9202274	Grace R. Hunt
9202276	Jane A. Bennett
9202278	D. Hope Pickett
9202279	Paul R. Kennedy
9202280	Donald J. Dusa and Joseph
9202281	Mary E. Vause
9202282	Neal Lesapsio, Jr.
9202283	Samuel P. Vause
9202285	D. Hope Pickett
9202290	Yahale Yadede
9202295	Ruby M. Patin
9202296	Richard L. Bagwell
9202298	John W. Collins
9202303	Eleanor M. Mondon
9202304	Paul R. Kennedy
9202305	Mary E. Vause
9202333	Ruby M. Patin
9202340	William J. Dillon
9202341	Johannes Floeck
9202345	John L. Mills, III
9202346	Grace R. Hunt
9202348	Robert W. Sonafrank
9202359	John W. Collins
9202363	Joseph E. Gerace
9202376	Paul H. Tiffin
9202377	M.P. & R.A. Peterson, Jr.
9202379	Dixie Cox
9202382	Robert W. Sonafrank
9202383	William J. Dillon
9202384	Richard L. Bagwell

CAPE GIRARDEAU, MISSOURI

9159257	Andrew J. Miller
9159258	Beulah S. Gerrish
9159259	Bowen Bo Wagner
9159260	Crystal M. Lloyd
9159261	David A. Gerber
9159262	David L. Ellsworth
9159263	David M. Williamson, Jr.
9159264	Dennis S. Aye
9159265	Donald Culotta & Assoc.
9159266	Drake D. Moser
9159267	Frank E. Landeck
9159268	Frederick J. Ortner
9159269	Gerald E. Edwards, Sr.
9159270	Gloria C. Ellsworth

APPENDIX A
Untimely Petitions for Reconsideration

CAPE GIRARDEAU, MISSOURI, continued

9159271	Howard Bialick
9159272	Iisa L. Lebach
9159273	Isiah Kendrick, Jr.
9159274	James C. Gerrish
9159275	John Scott
9159276	John E. Ferry
9159277	Kathryn A. Liss
9159278	Kathy D. Delio
9159279	Kim Newby
9159280	Mitchell Evanitsky
9159281	Ormond L. Howard
9159282	Patsy Parish McCurry
9159283	Paul J. Sweeney
9159284	R. Graham Reedy
9159285	Dr. Ray I. Martin
9159286	Robert K. Wawrousek
9159287	Robert D. Willock
9159288	Sam R. Turner
9159289	Samuel W. Johnston, III
9159290	Scott D. Chisholm
9159291	Timothy W. Howard
9159292	Todd Tamura
9159293	W. Norman Salter & Assoc.
9159294	Zoila A. Rodriquez

CASSVILLE, MISSOURI

9203944	Lipman Partnership
9203945	Lieberman Partnership
9203946	John L. Dragone
9203953	Henry F. Macaluso
9203954	Lester H. Miller
9203955	Jack W. Sampson
9203956	Benjamin H. Smookler
9203957	Anne Lacusky
9203958	Ruth S. Kulpon
9203959	V. Annette Suter
9203965	Richard Coughlin
9203966	Shaffer Partnership
9203967	V. Annette Suter
9203978	Eugene J. Kosciolek
9203979	Paul C. Witherspoon
9203980	Wiedrick Partnership
9203984	Robert L. Evans, Sr.
9203985	Donald R. Toth
9203986	Richard Rowdon
9203987	Richard Gordon
9203988	Shirley Stetson
9203990	Floyd R. Gallegos, Sr.
9203991	Van Nguyen
9203992	William Charles Menghini
9203993	George W. Starr
9203994	Sandra C. Kilpatrick
9203995	Henry F. Macaluso
9203996	Denicola Partnership
9203997	Lovett Partnership
9203999	Robert L. Evans, Sr.
9204000	George W. Starr
9204002	Jimmie Lee Starr
9204003	Edward H. Shockey
9204005	John Overman
9204006	Michael F. Buono
9204007	Thomas E. Dusa
9204008	Benjamin H. Smookler

APPENDIX A
Untimely Petitions for Reconsideration

CASSVILLE, MISSOURI, continued

9204009 John Overman
9204010 Ann V. Kemper
9204011 Richard C. Corey
9204012 Thomas E. Dusa
9204013 Gary R. Barnes
9204015 Peterson Partnership
9204038 Richard Rowdon
9204039 William Charles Menghini
9204040 Paul C. Witherspoon
9204041 Richard C. Corey
9204042 Rodney W. Bender
9204043 Alpini Partnership
9204044 Van Nguyen
9204045 Phil Blanton
9204046 Rachel Vazqu
9204069 Conrad Partnership
9204070 Hansel Partnership
9204071 Lipman Partnership
9204074 Andray F. McCuien
9204075 Lester H. Miller
9204076 Jack W. Sampson
9204077 Conrad Partnership
9204078 Yolanda R. Marni
9204079 Jimmie Lee Starr
9204080 Bernard Varriano
9204081 Gary L. Matte
9204082 American Microtel, Inc.
9204093 Eugene G. Lund
9204094 Earl H. Heyne
9204095 Floyd R. Gallegos, Sr.
9204096 Mockabee Partnership
9204097 Peterson Partnership
9204098 Lieberman Partnership
9204099 Margaret B. Keith
9204100 Richard Coughlin
9204101 Gary L. Matte
9204102 Shirley Stetson
9204103 Wiedrick Partnership
9204105 Anne Lacusky
9204106 Yolanda R. Marini
9204107 Richard Gordon
9204118 Virginia M. Tanner
9204119 Lovett Partnership
9204120 Ritacco Partnership
9204121 Denicola Partnership
9204122 Mockabee Partnership
9204123 Tuttle and Hilker Prtnrs.
9204125 Earl H. Heyne
9204129 Eugene G. Lund
9204130 Alpini Partnership
9204131 Townsend & Boyd Partners
9204132 Hansel Partnership
9204133 Edward H. Shockey
9204134 Herbert W. Lake
9204184 Andray F. McCuien
9204185 Phil Blanton
9204188 Josephine Dragone
9204191 Sandra C. Kilpatrick
9204192 Rodney N. Bender

APPENDIX A
Untimely Petitions for Reconsideration

CASSVILLE, MISSOURI, continued

9204193 Faynell F. Frye
9204194 Rachel Vazquez
9204195 American Microtel, Inc.
9204196 Tuttle and Hilker Part.
9204197 Townsend & Boyd Partners
9204200 Gary R. Barnes
9204201 Virginia M. Tanner
9204202 Ritacco Partnership
9204203 Shaffer Partnership
9204204 Ruth S. Kuplon
9204205 Herbert W. Lake
9204206 Donald R. Toth
9204207 Ann V. Kemper
9204208 Faynell F. Frye
9204209 Olga V. Boyd
9204211 John L. Dragone
9204212 Bernard Varriano
4204213 Arthur L. Dalton
9204214 Josephine Dragone

DUNNEGAN, MISSOURI

9200708 James B. Leary
9200709 S. Craig Blackburn
9200710 Bardell C & Linda K Hunt
9200711 N P & N M Panasik Ptnrsp
9200721 B M Molle & L J Vacek PA
9200722 Samuel W. Johnston, III
9200728 Marcelino L. Taboada
9200729 Roger L. Scott Trust
9200730 Billy G. Alexander
9200731 Peter J. Rush
9200732 Paul W. Duhon
9200733 Dewayne Rutherford
9200741 James B. Leary
9200742 S. Craig Blackburn
9200743 Michael R. Weaver
9200744 Wendell E. Frederickson
9200745 Bobby L. Parker
9200746 Donald F. Secor
9200747 Albert E. Cole
9200748 Elmer R. Smith
9200749 Cecile B. McKinney
9200750 Michael J. McNichol
9200762 Albert E. Cole
9200763 Jack L. Hall
9200764 Dale A. Schafer
9200765 Dorothy De Moya
9200766 Elmer R. Smith
9200767 Thomas E. Skeens
9200768 AMT Incentives, Inc.
9200770 Barry R. Fabriziani
9200771 N.E. Steward
9200772 John Torpey
9200773 Clara Kay Wall
9200774 Frank J. Coyle
9200775 AMT Incentives, Inc.
9200776 John Gestel
9200777 Bardell C & Linda K. Hunt
9200778 Thomas E. Skeens
9200779 Bobby L. Parker
9200780 Dale A. Schafer
9200781 Wendell E. Frederickson
9200782 Ann E.Lessig & Robert
9200783 N P & N M Panasik Prtsp.
9200784 Donald F. Secor
9200785 James J & Helen C Haddad
9200786 Dewayne Rutherford
9200787 Arthur N Smith IV
9200788 Roger L. Scott Trust
9200789 Thelma L. Fritsch
9200790 Cecile B. McKinney
9200791 William D. Hedrick
9200792 J.C. Thames
9200797 Peter J. Rush
9200798 Clara Kay Wall

APPENDIX A
Untimely Petitions for Reconsideration

DUNNEGAN, MISSOURI, continued

9200799 Paul W. Duhon
9200800 Michael J. McNichol
9200801 Gorham Living Trust
9200802 Ann E Lessig & Robert L
9200803 Delmon E. Ison
9200804 N.E. Steward
9200805 Jack L. Hall
9200806 B M Molle & LJ Vacek Pa.
9200807 David J. Hurley
9200808 Denny Craig
9200809 American Microtel, Inc.
9200810 William D. Hedrick
9200814 John Gestel
9200815 Coble Living Trust UDT12
9200816 Denny Craig
9200818 Robert E. Jimison
9200819 John Torpey
9200820 Arthur N Smith IV
9200831 Delmon E. Ison
9200832 Barry R. Fabriziani
9200833 Gorham Living Trust
9200834 Coble Living Trust UDT12
9200835 Raymond Siebert
9200836 Dorothy De Moya
9200837 Thelma L. Fritsch
9200838 J.C. Thames
9200839 Samuel W. Johnston, III
9200840 James Allen Hipps, Jr.
9200868 American Microtel, Inc.
9200869 David J. Hurley
9200870 James J & Helen C Haddad
9200871 Robert E. Jimison
9200872 Frank J. Coyle
9200873 Raymond Siebert
9200874 Billy G. Alexander
9200875 Michael R. Weaver
9200876 Marcelino L. Taboada
9200877 James Allen Hipps, Jr.

KENNETT, MISSOURI

9159660 Edwin E. Chapin
9159661 Kenneth R. Hardee
9159662 Frank E. Landeck
9159663 Lawrence H. Van Loo
9159664 Guy H. Greider
9159665 Stephen J. Mitchell
9159666 Rodney W. Weible
9159667 Dean B. Fickes
9159668 Dennis R. Cupp
9159669 Ken W. Crider
9159670 Herald W. Cornist
9159671 C.A.& R.E. Hughes
9159672 Jeffrey N. Jolcover
9159673 Richard A. Eyer
9159674 Arthur L. Dalton
9159675 Terry Riddle
9159676 Virgil A. Conley
9159677 Ronald L. Bond
9159678 Mary Frances Willcock
9159680 Bowen Bo Wagner
9159683 Robert D. Willock
9159684 James A Chisholm
9159685 Robert H. Baylis
9159687 Timothy W. Howard
9159688 Nancy J. Saxman
9159689 Howard Bialick
9159690 Ormond L. Howard
9159691 Robert W. White
9159692 Noel Smith
9159693 John Scott
9159694 Carolyn B. Leong
9159695 Angela J. Lee
9159696 Judy Ladner
9159697 Leona Hentz
9159699 Jack Craig
9159701 Ronald J. Rider

APPENDIX A
Untimely Petitions for Reconsideration

KENNETT, MISSOURI, continued

9159704 Lafaye E. Reed
9159705 AMT Incentives, Inc.
9159707 Robert M. Benson
9159708 Elias Mosqueda
9159709 George C. Brewer
9159710 Judy Ladner
9159712 Stephen J. Mitchell
9159713 Guy Grieder
9159714 Ronald J. Rider
9159715 John Scott
9159717 Ormond L. Howard
9159719 Herald W. Cornist
9159720 Ken W. Crider
9159721 Dennis R. Cupp
9159722 Dean B. Fickes
9159723 Frank E. Landeck
9159727 Nancy J. Saxman
9159728 Kenneth R. Hardee
9159729 Leona Hentz
9159730 Hughes, C.A. & R.E.
9159731 Robert H. Baylis
9159732 Jeffrey N. Jolcover
9159733 Timothy W. Howard
9159734 Terry Riddle
9159735 Angela J. Lee
9159736 Noel Smith
9159737 Robert W. White
9159738 Lawrence H. Van Loo
9159739 Arthur L. Dalton
9159740 Rodney W. Weible
9159742 Jack Craig
9159743 Ronald L. Bond
9159744 Ida Richard
9159745 Robert M. Benson
9159746 Howard Bialick
9159747 AMT Incentives, Inc.
9159749 Robert D. Willock
9159750 Mary Frances Willock
9159752 George Brewer
9159753 Arthur Dalton
9159754 James Chisholm
9159755 Richard Eyer
9159756 Virgil Conley
9159757 Bowen Bo Wagner

GRANTSBORO, NORTH CAROLINA

9203061 Roger A. Thrus
9203062 Lois Marie Riseling
9203063 James J. Cassity
9203064 A. Lorraine Winter
9203065 John L. Robinson
9203078 Paul S. Frey
9203095 R. Trent Coleman
9203101 Brian E. Webb
9203103 Sandra Boyd
9203105 Cheryl Cervone
9203110 Edward W. Samoden
9203111 Robert H. Machen, Jr.
9203112 Susan K. Thrush
9203124 Dubel Partners
9203149 Arthur L. Dalton
9203150 Ida Richard
9203158 R. Trent Colemanh
9203163 Robert H. Machen, Jr.
9203174 Brian E. Webbh
9203216 Raymond L. Odom
9203217 James J. Cassity
9203218 Edward W. Samodem
9203219 Stephen J. & Deborah Ahle
9203221 Earl H. Heyne
9203222 John L. Robinson
9203224 Sandra Boyd
9203237 Rapkin Living Trust
9203239 Cheryl Cervone
9203243 Bowen Bo Wagner
9203247 Paul S. Frey
9203248 Roger A. Thrush
9203260 Stephen J. & Deborah Ahle

APPENDIX A
Untimely Petitions for Reconsideration

GRANTSBORO, NORTH CAROLINA, continued

9203267 Lois Marie Riseling	9203306 B. Oreen Jackson
9203268 Larry D. Sorensen	9203308 Bowen Bo Wagner
9203269 A. Lorraine Winter	9203310 Mark J. Zetter
9203277 Raymond L. Odom	9203312 Rapkin Living Trust
9203279 Jan P. Chase	9203318 Ida Richard
9203304 Dubel Partners	9203321 Earl H. Heyne

MIDWAY, NORTH CAROLINA

9158369 Clyde F. Marquardt	9158385 William Carl Crane, III
9158370 David A. Bowman	9158386 William L. Freeman, III
9158371 David H. Kilroy	9158389 Beck and Beck Co.
9158372 Edward J. Witten	9158390 C.R. Rouse, III
9158373 George C. Carlos	9158393 Lynnea Bylund
9158374 Joe H. Lesley	9158394 Professional Network Mar.
9158375 John L. Russell, Jr.	9158395 Robert L. White, Jr.
9158376 Judith B. Keating	9158397 Sammy L. Cates
9158378 Lee Gregory/Larry Bowman	9158398 Sheila P. Hewie
9158379 Lutrell McDuffie	9158399 Susan H. Schultz
9158380 Nancy C. Parks	9158400 Thmas L. Foster
9158381 Ozie L. Garrett	9158401 Wayne S. Danforth
9158383 Raymond Brodersen	9158402 William L. Westers
9258384 W.C. Crane, Jr.	

ASHLEY-WISHEK, NORTH DAKOTA

9251499 Norman A. Proulx	9251545 Marc E. Pequignot
9251502 Marc E. Pequignoi	9251551 John F. Doyle
9251504 Lionel Harmon	9251552 Jacquelyn Schultz
9251509 Jacquelyn Schultz	9251555 George W. Starr
9251512 George W. Starr	9251556 Gene L. Tuttle
9251513 Gene L. Tuttle	9251557 Gale B. King
9251520 Donald W. Benshoff	9251560 Edward A. Maestas
9251524 Dale Painter Partnership	9251562 Dorothy K. White
9251526 Betty J. Sinclair	9251563 Donald W. Benshoff
9251530 Anne M. Bobinski	9251567 Dale Painter Partnership
9251536 Robert E. Schultz	9251570 Betty J. Sinclair
9251542 Norman A. Proulx	9251571 Arthur L. Dalton
9251543 N. & H.Y. Tatsumi Part.	9251574 Anne M. Bobinski

NEW BRUNSWICK, NEW JERSEY

9160816 Michael Manno

APPENDIX A
Untimely Petitions for Reconsideration

BELEN, NEW MEXICO

9250125 Albert J. Cantale
9250126 Albert J. Cantale
9250127 Alta Garfield, MD
9250128 Alta Garfield, MD
9250129 American Microtel, Inc.
9250130 American Microtel, Inc.
9250131 Andrew W. Tice
9250132 Andrew W. Tice
9250133 Arrie M. Ashley
9250134 Arrie M. Ashley
9250135 Arthur L. Dalton
9250136 Arthur L. Dalton
9250138 Arthur L. Roy
9250139 Arthur L. Roy
9250140 Benjamin S. Oglesby
9250141 Benjamin S. Oglesby
9250142 Brooke Ann Adamson
9250143 Brooke Ann Adamson
9250144 Chester Alan Kesler
9250145 David A. Lamacchia
9250146 David A. Lamacchia
9250147 David Fertel
9250148 David Yunker
9250149 David Yunker
9250150 Debra Schlickbernd
9250151 Debra Schlickbernd
9250152 Donald R. Toth
9250153 Donald R. Toth
9250154 Edna B. Kuppers
9250155 Frank N. Wisecup
9250156 Frank N. Wisecup
9250157 Frank S. Cotton
9250158 Fred D. Adams
9250159 Fred D. Adams
9250160 Frederick M. Swartz
9250161 Frederick M. Swartz
9250162 George D. Christiansen
9250163 George D. Christiansen
9250164 Gregory M. Smith
9250165 Gregory M. Smith
9250166 Howard W. Packer
9250167 Howard W. Packer
9250168 James Traicoff
9250169 James Traicoff
9250170 Jerome G. Quinn
9250171 Jerome G. Quinn
9250172 J.L.&L.P. Minear Partnrs.
9250173 J.L.&L.P. Minear Partnrs.
9250174 Judy N. Mitchell
9250175 Judy N. Mitchell
9250176 Jung, Keesee Prtnr.
9250177 Jung, Keesee Prtnr.
9250178 Chester Alan Kesler
9250179 David Fertel
9250180 Edna B. Kuppers
9250181 Frank S. Cotton
9250182 Knobloch Crutchfield
9250183 Loretta A. Quinn
9250184 Mary Conway
9250185 Mignacco, Brooker Part.
9250186 Noel Smith
9250187 Norbert Zalewski
9250188 Paul Schlickbernd
9250189 Peter M. Wendt
9250190 Phyllis P. Farragher
9250191 Richard Benedetti
9250192 Richard C. Kitchell
9250193 Richard O. Petrick
9250194 Robert D. Allan
9250195 Robet M. Benson
9250196 Rodney W. Stelter
9250197 Teresa A. Beaudet
9250198 Tom Coslar
9250199 Wm & Josephine Grande Pt.
9250200 William H. Horton
9250201 Knobloch Crutchfield
9250202 Loretta A. Quinn
9250203 Mary Conway
9250204 Mignacco, Brooker Part.
9250205 Noel Smith
9250206 Norbert Zalewski

APPENDIX A
Untimely Petitions for Reconsideration

BELEN, NEW MEXICO, continued

9250207 Paul Schlickbernd
9250208 Peter M. Wendt
9250209 Phyllis P. Farragher
9250210 Richard Benedetti
9250211 Richard C. Kitchell
9250212 Richard O. Petrick
9250213 Robert D. Allan
9250214 Robert M. Benson
9250215 Rodney W. Stelter
9250216 Terry Riddle
9250217 Tom Coslar
9250218 Wm & Josephine Grande Pt.
9250219 William H. Horton

COSHOCTON, OHIO

9251357 Cynthia Carter
9251358 Cynthia G. Berry
9251359 Dale Parham
9251360 Dan P. Knight
9251361 Dana D. Freberg
9251362 David A. Miller
9251363 David B. Pickford
9251364 D.W. & C.J. Delaney Part.
9251365 Davis, Maduri Partners
9251366 Dennis V. Klima
9251367 Donald R. Toth
9251368 Edna P. Fisher
9251369 Fred McGee
9251370 Gerald S. Guzdial
9251371 Gerald Sherman
9251372 Greg A. Shoup
9251373 Gretchen Turner
9251374 Henry E. Sandau
9251375 Howard C. Kress, Jr.
9251376 Ida Richard
9251377 J.L. & P.S. Lawrence Par.
9251378 James Traicoff
9251379 Jeffrey C. Brenner
9251380 John Saunders
9251381 J.A. & R. Montecalvo
9251382 John H. Baty
9251383 John L. Schroeder
9251384 J.W. & V.M. Larson Part.
9251385 Joy W. Whistle
9251386 Juanita Johnson
9251387 Karen R. Julius
9251388 Kathryn S. Houston
9251389 M.D. & L.R. Robertson
9251390 Larry V. Eck
9251391 Lee E. Adams
9251392 Mary A. Mitchell
9251393 Michael K. Byrne
9251394 Noel Smith
9251395 N.E. & E. Wykoff Part.
9251396 Odessa L. Lamp
9251397 Paul Schlickbernd
9251398 Peter M. Wendt
9251399 R. Lee Fuller
9251400 R.J. & C. Lefevre Part.
9251401 R.J. & L. Marchetti Part.
9251402 Richard O. Brune
9251403 Robert J. Heatherly
9251404 Robert L. Butler, Sr.
9251405 Robert M. Benson
9251406 Scott E. Schroeder
9251407 Thomas W. Hoffman
9251408 Trent Associates
9251409 William D. Hedrick
9251410 American Microtel, Inc.
9251411 AMT Incentives, Inc.
9251412 Arnold Meiers
9251413 Arthur L. Dalton
9251414 Betty Brown
9251415 Bob & Mar. Towsley Ptrns.

APPENDIX A
Untimely Petitions for Reconsideration

COSHOCTON, OHIO, continued

9251416 Carlos B. Herrin
9251417 Carolyn K. Miller
9251418 Catherine Demers
9251419 Charles Frediger
9251420 Charles G. Mason
9251421 Christopher R. Ruberg
9251422 Claudia K. Cicairos
9251423 Cynthia Carter
9251424 Cynthia G. Berry
9251425 Dale Parham
9251426 Dana D. Freberg
9251427 David A. Miller
9251428 David B. Pickford
9251429 D.W. & C.J. Delaney Part.
9251430 Davis, Maduri Partners
9251431 Dennis V. Klima
9251432 Donald R. Toth
9251433 Edna P. Fisher
9251434 Fred McGee
9251435 Gerald S. Guzdial
9251436 Gerald Sherman
9251437 Greg A. Shoup
9251438 Gretchen Turner
9251439 Henry E. Sandau
9251440 Howard C. Kress, Jr.
9251441 Ida Richard
9251442 J.L.& P.S. Lawrence Part.
9251443 James Traicoff
9251444 Jeffery C. Brenner
9251445 J.A. & R. Montecalvo
9251446 John H. Baty
9251448 John Saunders
9251449 J.W. & V.M. Larson Part.
9251450 Joy W. Whistle
9251451 Juanita Johnson
9251452 Karen R. Julius
9251453 Kathryn S. Houston
9251454 Larry V. Eck
9251455 Lee E. Adams
9251456 Mary A. Mitchell
9251457 M.D. & L.R. Robertson
9251458 Michael K. Byrne
9251459 Noel Smith
9251460 N.E. & E. Wykoff Part.
9251461 Odessa l. Lamp
9251462 Paul Schlickbernd
9251463 Peter M. Wendt
9251464 R. Lee Fuller
9251465 R.J. & C. Lefevre Part.
9251466 R.J. & L. Marchetti Part.
9251467 Richard O. Brune
9251468 Robert J. Heatherly
9251469 Robert L. Butler, Sr.
9251470 Robert M. Benson
9251471 Scott E. Schroeder
9251472 Thomas W. Hoffman
9251473 Trent Associates
9251474 William D. Hedrick
9251475 Dan P. Knight
9251476 American Microtel, Inc.

DEFIANCE, OHIO

9160878 Evelyn M. Kaezkowski
9160883 Betty J. Sinclair

PENDLETON, OREGON

9162304 Timothy E. Gordon
9162398 Paul A. Jarczyk
9162402 Ronald J. Knisley
9162419 Nicholas M. Boccio
9162423 Robert E. Shultz
9162425 Stanley N. Cichowski

APPENDIX A
Untimely Petitions for Reconsideration

RIDGEWAY, PENNSYLVANIA

9252239 Lynnea Byland
9252238 Jonathan C. Sommers
9252260 Paul A. Jarczyk

PARIS,TENNESSEE

9250296 Raymond V. Tupper
9250297 Richard A. Eyer
9250298 Richard Petrick
9250299 Richard S. Singer
9250300 Robert M. Benson
9250301 Robert K. Wawrousek
9250302 Stephen A. Stefan
9250303 Ted C. & Peggy C. Walberg
9250304 Thomas W. Hoffman
9250305 Timothy W. Howard
9250306 Tom B. Hatcher
9250307 Vijay Gupta
9250308 William D. Hutton
9250309 William T. Harney
9250310 Wilma Dixon
9250311 Manowske & Smith Partner
9250312 Marilyn A. Harney
9250313 Merton Levin
9250314 Michael Mitton
9250315 Michael O'Neill
9250316 Nancy Gustafson-Smith
9250317 Nathan B. Zenack
9250318 Noel Smith
9250319 Paul B. Edmonds
9250320 Peter M. Wendt
9250321 James O. O'Neal
9250322 James S. Crawford
9250323 James Traicoff
9250324 Jerome G. Quinn
9250325 Jim Weaver
9250326 John D. Vodica, Jr.
9250327 John Gonsalves
9250328 Joseph Paulitsch
9250329 Kenneth Duwell
9250330 Kimberly B. Adams
9250331 Larry R. Moore
9250332 Lee E. Adams
9250333 Lloyd F. Dow
9250334 Loretta A. Quinn
9250335 David Del Castillo
9250336 Lucille C. Tegtmeier
9250337 David Fertel
9250338 Donald R. Toth
9250339 Edna P. Fisher
9250340 Edwin E. Chapin
9250341 Elias Mosqueda
9250342 G. Robert Hanson
9250343 George D. Christiansen
9250344 Greg A. Shoup
9250345 Howard Bialick
9250346 Ida Richard
9250347 Jacklyn J. Moore
9250348 A/B Financial, Inc.
9250349 Albert P. & Lena R. Spera
9250350 American Microtel, Inc.
9250351 Arhtur L. Dalton
9250352 Bruce T. Peacock
9250353 C.R. Moore

APPENDIX A
Untimely Petitions for Reconsideration

PARIS, TENNESSEE, continued

9250354 Carolyn A. Whitley
9250355 Charles Arbeiter
9250356 Charles E. Yarbrough III
9250357 C.M. & J.M. Miller Ptnrs.
9250358 Dana P. Deer
9250359 Daniel J. Thorning
9250360 Danile P. Walker
9250361 Daryl L. Harney
9250362 Michael Mitton
9250363 Michael O'Neil
9250364 Nancy Gustafson-Smith
9250365 Nathan R. Zenack
9250366 Noel Smith
9250367 Paul R. Edmonds
9250368 Peter M. Wendt
9250369 Raymond V. Tupper
9250370 Richard A. Eyer
9250371 Richard Petrick
9250372 Richard S. Singer
9250373 Robert M. Benson
9250374 Robert K. Wawrousek
9250375 Stephen A. Stefan
9250376 Ted C. & Peggy C. Walberg
9250377 Thomas W. Hoffman
9250378 Timothy W. Howard
9250379 Tom B. Hatcher
9250380 Vijay Gupta
9250381 William D. Hutton
9250382 William T. Harney
9250383 Wilma Dixon
9250384 James Traicoff
9250385 Jerome G. Quinn
9250386 Jim Weaver
9250387 John D. Vodica, Jr.
9250388 John Gonsalves
9250389 Joseph Paulitsch
9250390 Kenneth Duwell
9250391 Kimberly B. Adams
9250392 Larry R. Moore
9250393 Lee E. Adams
9250394 Lloyd F. Dow
9250396 Lucille C. Tegtmeier
9250397 Manowske & Smith Partner
9250398 Marilyn A. Harney
9250399 Merton Levin
9250400 David Fertel
9250401 Donald R. Toth
9250402 Donald R. Toth
9250403 Edwin E. Chapin
9250404 Elias Mosqueda
9250405 G. Robert Hanson
9250406 George D. Christiansen
9250407 Greg A. Shoup
9250408 Howard Bialick
9250409 Ida Richard
9250410 Jacklyn J. Moore
9250411 James O. O'Neal
9250412 James S. Crawford
9250413 A/B Financial, Inc.
9250414 Albert P. & Lena R. Spera
9250415 American Microtel, Inc.
9250416 Arhtur L. Dalton
9250417 Bruce T. Peacock
9250418 C.R. Moore
9250419 Carolyn A. Whitley
9250420 Charles Arbeiter
9250421 Charles E. Yarbrough, III
9250422 C M & J M Miller Partns.
9250423 Dana P. Deer
9250424 Daniel J. Thorning
9250425 Daniel P. Walker
9250426 Daryl L. Harney
9250427 David Del Castillo

APPENDIX A
Untimely Petitions for Reconsideration

CENTER, TEXAS

9161315 Thomas W. Johansen
9161316 Ronald Harper
9161317 Tom B. Hatcher
9161318 Valerie W. Mills
9161319 William Lane
9161320 John Neal Throckmorton
9161321 Joseph W. Larson
9161323 Kenneth Shore
9161324 Lawrence E. Burns
9161325 Lloyd F. Dow
9161326 Mark W. Butler
9161327 Noel Smith
9161328 Patricia M. Johansen
9161329 P.F. & L. M. Berry
9161330 Dr. Ray I. Martin
9161331 R.R. & L.E. Amato Part.
9161332 Robert Krawiecki
9161333 Robert D. Willock
9161334 Robert G. McConnell
9161335 Robert M. Benson
9161336 Robert W. White
9161337 Robin A. Manning
9161338 A.M, J. Brooker Part.
9161339 American Microtel, Inc.
9161340 AMT Incentives, Inc.
9161341 Andrew J. Miller
9161342 Arnold Meiers
9161343 Arthur L. Dalton
9161344 Austin A. O'Dell, Jr.
9161345 Charles G. Mason
9161346 D.D. & J.F. Matthias
9161347 David N. Welborn
9161348 Eugenia O. Andrews
9161349 Frank Mohler
9161350 Gerald Sherman
9161351 Gerald S. Guzdial
9161352 H.T. & R.B. George Part.
9161353 Howard Bialick
9161354 Irene Noyes Partnership
9161355 J. Randall Thomas
9161356 James F. Thomas
9161357 J.L. & G.R. Wilson
9161358 Jan Balazik
9161359 John B. Clark
9161360 Joseph W. Larson
9161361 John B. Clark
9161362 J.L. & G.R. Wilson Part.
9161363 James F. Thomas
9161364 J. Randall Thomas
9161365 Irene Noyes Partners
9161366 H.T. & R.B. George Part.
9161367 Gerald S. Guzdial
9161368 Frank Mohler
9161369 Eugenia O. Andrews
9161370 David N. Welborn
9161371 D.D. & J.F. Matthias
9161372 Charles G. Mason
9161373 American Microtel,Inc.
9161375 William Lane
9161376 Valerie W. Mills
9161377 Tom B. Hatcher
9161378 Thomas W. Johansen
9161379 Ronald Harper
9161380 Robert G. McConnell
9161381 Robert Krawiecki
9161382 R.R. & L.E. Amato Part.
9161383 Ray I. Martin
9161384 P.F. & L. M. Berry Prt.
9161385 Patricia M. Johansen
9161386 Mark W. Butler
9161387 Kenneth Shore
9161388 Lawrence E. Burns
9161390 John Neal Throckmorton
9161391 Jan Balazik
9161392 Howard Bialick
9161393 Austin A. O'Dell, Jr.
9161394 Gerald Sherman
9161395 Arthur L. Dalton
9161396 Arnold Meiers
9161397 Andrew J. Miller
9161398 AMT Incentives, Inc.

APPENDIX A
Untimely Petitions for Reconsideration

CENTER, TEXAS, continued

9161399 Robin A. Manning
9161400 Robert W. White
9161401 Robert M. Benson
9161402 Robert D. Willock
9161403 Noel Smith
9161404 Lloyd F. Dow

CROCKETT, TEXAS

9201233 Joanne Gunnin
9201234 Maudie S. Ladnier
9201235 Ida Richard
9201236 Stombler Horton Partners
9201238 Samuel P. Vause
9201239 Lillie R. Brown
9201242 Maudie S. Ladnier
9201246 L Jyll Pickett
9201248 Larry Allen Reed
9201250 Mary Frances Cassell
9201251 William Danny Brown
9201252 Crawford Bailey
9201253 Joanne Gunnin
9201254 Burtis B. Cagle
9201256 Michael David Martin
9201258 William Danny Brown
9201259 Ida Richard
9201262 Burtis B. Cagle
9201265 Stephen B. Cagle
9201270 Robert C. Delker
9201271 Stephen B. Cagle
9201280 Brzozowski Ptnrs.
9201281 Stombler Horton Partners
9201282 Crawford Bailey
9201284 L Jyll Pickett
9201285 Larry Allen Reed
9201286 Lillie R. Brown
9201288 Michael David Martin
9210289 Samuel P. Vause
9201290 Mary Frances Cassell
9201291 Robert C. Delker

HUNTSVILLE, TEXAS

9161418 Charles M. Cushing, Jr.
9161421 Daniel J. Thorning
9161422 Darren R. Ellis
9161423 Diana A. Tufts
9161424 Edna P. Fisher
9161426 Bobby G. Wright
9161427 Edward F. Malkin
9161428 Eileen K. Riedel
9161429 Hobart Whaley
9161430 Fred R. Coffey
9161431 J. Phillip Citta
9161432 James E. Boyd
9161433 James A. Holland
9161435 Wilma Dixon
9161436 Sylvia C. Hall
9161437 Richard S. Mayberry
9161439 Samuel W. Valenza, Jr.
9161440 Stephen W. Janicek
9161441 Steve Urick
9161443 John W. Woodlee
9161444 Joseph Paulitsch
9161445 Joseph F. Gamble, Jr.
9161446 Kathryn L. Buehrig
9161447 Lomax Gwathmey
9161448 Marty L. Bodeker
9161449 Mary A. Mitchell
9161450 Mary H. Christopher
9161451 May L. Rowe
9161453 Nathan B. Zenack
9161454 James R. Jones
9161455 James R. Wilson
9161456 James H. Wilson
9161457 James H. Reid
9161458 Ida Richard

APPENDIX A
Untimely Petitions for Reconsideration

HUNTSVILLE, TEXAS, continued

9161459 Edwin E. Chapin
9161460 Bruce T. Peacock
9161461 AMT Incentives, Inc.
9161462 American Microtel, Inc.
9161463 Barton C. White
9161464 Arhtur L. Dalton
9161465 Arna Mae Dershem
9161466 Andrew J. Miller
9161467 P.F. & L.M. Berry Ptnrs
9161468 Noel Smith
9161471 Kay Kinne Beal
9161473 John H. Chase
9161474 Jan Balazik
9161475 James S. Crawford
9161477 Ronald L. Bond
9161478 Robin A. Manning
9161479 Robert M. Benson
9161480 Richard W. Martin
9161481 R.R. & L.E. Amato Part.
9161482 Richard A. Eyer
9161483 Randall A. Lenz
9161484 Thomas W. Johansen
9161485 Valerie W. Mills
9161486 Steve Urick
9161487 Stephen W. Janicek
9161488 Samuel W. Valenza, Jr.
9161489 Ronald L. Bond
9161490 Robin A. Manning
9161491 Robert M. Benson
9161493 Richard W. Martin
9161494 Richard S. Mayberry
9161495 R.R. & Le.e. Amato Part.
9161496 Richard A. Eyer
9161497 Randall A. Lenz
9161498 P.F. & L.M. Berry Part.
9161499 Noel Smith
9161501 AMT Incentives, Inc.
9161502 Andrew J. Miller
9161503 Arna Mae Dershem
9161505 Barton C. White
9161506 Bobby G. Wright
9161507 Bruce T. Peacock
9161508 Charles M. Cushing, Jr.
9161510 Daniel J. Thorning
9161511 Darren R. Ellis
9161512 Diana A Tufts
9161513 Edna P. Fisher
9161514 Edward F. Malkin
9161515 Edwin Chapin
9161516 Eileen K. Riedel
9161517 Fred R. Coffey
9161518 Hobart Whaley
9161519 Ida Richard
9161520 J. Phillip Citta
9161522 James A. Holland
9161523 James E. Boyd
9161524 James H. Reid
9161525 James H. Wilson
9161526 John W. Woodlee
9161527 Joseph Paulitsch
9161528 Joseph F. Gamble, Jr.
9161530 Kathryn L. Buehrig
9161531 Kay Kinne Beal
9161533 Lomax Gwathmey
9161534 Marty L. Bodeker
9161535 Marty A. Mitchell
9161536 Marty H. Christopher
9161537 May L. Rowe
9161539 Nathan R. Zenack
9161540 Sylvia C. Hall
9161541 Thomas W. Johansen
9161542 Valerie W. Mills
9161543 Wilma Dixon
9161544 Jan Balazik
9161545 John H. Chase
9161546 American Microtel, Inc.
9161547 James S. Crawford
9161549 James R. Wilson
9161551 Mary L. Rowe

APPENDIX A
Untimely Petitions for Reconsideration

JASPER, TEXAS

9161905 Bowen Bo Wagner
9161906 Carpenter Motors Inc.
9161974 Carpenter Motors Inc.
9162000 Bowen Bo Wagner

MEXIA, TEXAS

9202260 Paul George
9202263 Anthony J. Miller
9202265 Arthur L. Dalton
9202268 Timothy James Hodges
9202269 John F. Farr, Jr.
9202277 Timothy D. Harvey
9202284 Gerald R. Haas
9202286 James H. Hodges, Jr.
9202300 Robert H. Machen, Jr.
9202302 Robert H. Machen, Jr.
9202306 Gayle D. Fowler
9202307 Jeffrey K. Gunnin
9202308 Gayle D. Fowler
9202311 Samuel P. Vause
9202312 Charles R. Barnhill
9202315 Anthony J. Miller
9202316 Jeffrey K. Gunnin
9202317 Gerald R. Haas
9202320 Charles R. Barnhill
9202321 Stabley B. Harvey
9202324 Douglas E. Anderson
9202325 Samuel P. Vause
9202326 Schwaig Partnership
9202330 Robert L. Edwards, Sr.
9202332 Ida Richard
9202342 Timothy James Hodges
9202347 Robert L. Edwards, Sr.
9202349 Stanley B. Harvey
9202353 Arthur L. Dalton
9202367 Romulus Finley Hodges
9202369 James H. Hodges, Jr.
9202370 Timothy D. Harvey
9202371 Johannes Floeck
9202372 Schwaig Partnership
9202373 John F. Farr, Jr.
9202374 Ida Richard
9202375 Johannes Floeck
9202378 L Jyll Pickett
9202385 Douglas E. Anderson
9202387 L. Jyll Pickett
9202388 Paul George

APPENDIX A
Untimely Petitions for Reconsideration

SAN DIEGO, TEXAS

9161741 A Mignacco, J Brooker
9161742 A.S. & L.M. Berardino
9161743 American Microtel, Inc.
9161744 AMT Incentives, inc.
9161745 Arnold H. Scheer
9161746 Arthur L. Dalton
9161747 Barton C. White
9161748 Bruce C. McClurg
9161749 Catherine Demers
9161751 Claudia K. Cicairos
9161753 Daniel J. Thorning
9161754 Daniel P. Walker
9161756 D.D. & J.F. Matthias
9161757 Deborah A. Martin
9161758 Don Shawver
9161759 Donald R. Toth
9161760 Edward F. Malkin
9161761 Edwin E. Chapin
9161762 Frederic Brous
9161763 Gary Arnold
9161765 George D. Christiansen
9161766 Harry J. Yeackel
9161767 Hubert Lee
9161768 Ida Richard
9161769 James E. Boyd
9161770 James F. Gonring
9161771 James J. Berry
9161772 Jan Balazik
9161773 Joe D. Dobbins
9161774 John Saunders
9161775 John A. Reuther
9161776 John B. Clark
9161777 John G. Robertson
9161780 Joe Wagner
9161782 Keith B. Smith
9161783 K.A. & N. Wolis
9161784 Lloyd F. Dow
9161785 Louise C. McCue
9161786 Mamorn Shisido
9161790 Noel Smith
9161792 R.M. & B.B. Mansfield
9161793 Richard O. Petrick
9161794 Robert E. Brennan
9161795 Robert G. McConnell
9161796 Robet M. Benson
9161797 Rodney W. Weible
9161799 Ruby Hamilton
9161800 Samuel E. Byrd
9161801 Solomon Ripstein
9161802 Stephen V. Janicek
9161803 Tim Graves
9161804 Tommy A. Matheny
9161805 Wanda Spurgeon Laird
9161806 Wilma M. Palmer
9161825 A Mignacco, J Brooker
9161826 A.S. & L.M. Berardino
9161827 American Microtel, Inc.
9161828 AMT Incentives, Inc.
9161829 Arnold H. Scheer
9161830 Arthur L. Dalton
9161831 Barton C. White
9161832 Bruce C. McClurg
9161833 Carpenter Motors Inc.
9161834 Catherine Demers
9161835 Charles E. Coleman
9161836 Claudia K. Cicairos
9161839 Daniel P. Walker
9161840 David A. Miller

APPENDIX A
Untimely Petitions for Reconsideration

SAN DIEGO, TEXAS, continued

9161841 D.D. & J.F. Matthias
9161842 Deborah A. Martin
9161843 Don Shawver
9161844 Donald R. Toth
9161845 Edward F. Malkin
9161846 Edwin E. Chapin
9161847 Frederic Brous
9161848 Gary Arnold
9161849 George A. Schram
9161850 George D. Christiansen
9161851 Harry J. Yeackel
9161852 Hubert Lee
9161853 Ida Richard
9161854 James E. Boyd
9161855 James F. Gonring
9161856 James J. Berry
9161857 Jan Balazik
9161858 Joe D. Dobbins
9161859 John Saunders
9161860 John A. Reuther
9161861 John B. Clark
9161862 John G. Robertson
9161866 Keith B. Smith
9161868 Lloyd F. Dow
9161869 Louise K. McCue
9161870 Mamorn Shishido
9161872 Mignacco, Brooker Part.
9161873 Nelson J. Vetter, Jr.
9161876 R.M. & B.B. Mansfield
9161877 Richard O. Petrick
9161878 Robert E. Brennan
9161879 Robert G. McConnell
9161880 Robert M. Benson
9161881 Rodney W. Weible
9161882 Ronald J. Rider
9161883 Ruby Hamilton
9161884 Samuel E. Byrd
9161885 Solomon Ripstein
9161886 Stephen V. Janicek
9161887 Tim Graves
9161888 Tommy A. Matheny
9161889 Wanda Spurgeon Laird
9161890 Wilma M. Palmer

PRICE, UTAH

9203348 Harold D. Mills
9203349 Arthur L. Dalton
9203350 Rachel Vazquez
9203351 Woodward Partnership
9203352 Richard Rowdon
9203353 American Microtel, Inc.
9203354 Joseph J. Lombardi, III
9203355 Richard S. Hall
9203356 Arthur E. Gasch
9203357 Jon T. Boehnlein
9203454 David P. Cramer
9203455 A. David Lynch
9203456 Clifford F. Harness, Sr.
9203457 Richard Gordon
9203458 Jennie W. Farwell
9203461 Florence M. Schoelpple
9203462 Joseph N. Palazzolo
9203463 Abe L. Angell
9203464 Richard Shirasawa
9203490 Donald R. Toth
9203491 James P. Hickox, Jr.
9203492 Rodney N. Bender
9203493 Andrew A. Pastewski
9203494 Jean A. Richards

RICHFIELD, UTAH

9157529 John M. Parolini
9157530 John M. Parolini

APPENDIX A
Untimely Petitions for Reconsideration

COLFAX, WASHINGTON

9162434 Gary D. Harris
9162435 R.A. & B.W. Steiner
9162436 Leon P. Shatek
9162437 Kenneth H. Morris
9162438 Joseph F. Rodgers
9162439 J.P. & A.M. Clements
9162440 John M. Wallace
9162441 John G. Williams, II
9162442 Jime Weaver
9162443 C. & M.E. Munson Part.
9162444 Catherine M. Tigner
9162445 Bettye Joanne Grob
9162446 American Microtel, Inc.
9162447 Arhtur L. Dalton
9162448 Alex David
9162449 Rosemarie M. Krawiecki
9162450 Rose Marie Reagan
9162451 Roger D. Callahan
9162452 Rodney W. Stelter
9162453 Robert M. Benson
9162454 Richard E. Whitfill
9162455 Raymond V. Tupper
9162456 R.A. & A.F. Bobbitt Part.
9162457 Phyllis P. Farragher
9162458 Peter M. Wendt
9162459 Paul W. Duhon
9162460 Noel Smith
9162461 Manowske Partnership
9162462 Malik Hamman Ali
9162463 Lorretta A. Quinn
9162464 Lomax Gwathmey
9162465 Lester H. Miller
9162466 Jerome G. Quinn
9162467 James H. Wilson
9162468 Jeffery C. Brenner
9162469 J.W. & M.L. Hrold Part.
9162470 Howard W. Packer
9162471 Geroge F. Hawkins
9162472 Gary D. Schultz
9162473 Frank N. Wisecup
9162474 Eric J. Loadman
9162475 Edward E. Chapin
9162476 Donald R. Toth
9162477 D.M. & W.E. Walton Part.
9162478 D.E. & M.A. Anderson Part
9162481 Williw W. Kilgore Mrs.
9162482 William K. Miller
9162483 W.J. & M.A. Welford Part.
9162484 Stephen P. Petrick
9162485 Roger D. Callahan
9162486 Rodeny W. Stelter
9162487 Richard E. Whitfill
9162488 Raymond V. Tupper
9162489 R.A. & B.W. Steiner
9162490 Willie W. Kilgore Mrs.
9162491 W.J. & M.A. Welford Part.
9162492 Thomas K. Lau
9162493 Stephen P. Petrick
9162494 Rosemarie M. Krawiecki
9162495 Manowske Partnership
9162496 Malik Hamman Ali
9162497 Rose Marie Reagan
9162498 Paul W. Duhon
9162499 J.W. & M.L. Harold Part.
9162500 R. & A.F. Bobbitt Part
9162501 Phyllis P. Farragher
9162502 Kenneth H. Morris
9162503 Joseph F. Rodgers
9162504 J.P. & A.M. Clements
9162505 John M. Wallace
9162506 Jim Weaver
9162507 Lester H. Miller
9162508 Alex David
9162509 C.W. & P.L. Part.
9162510 C. & M.E. Munson Part.
9162511 Catherine M. Tigner
9162512 Bettye Joanne Grob
9162513 D.E. & M.A. Anderson Part
9162514 Eric J. Loadman
9162515 Edward E. Chapin
9162516 Gary D. Schultz
9162517 George F. Hawkins

APPENDIX A
Untimely Petitions for Reconsideration

COLFAX, WASHINGTON, continued

9162518 William K. Miller
9162519 Robert M. Benson
9162520 Lorretta A. Quinn
9162521 Noel Smith
9162522 Peter M. Wendt
9162523 Howard W. Packer
9162524 Jeffery C. Brenner
9162525 James H. Wilson
9162526 Jerome G. Quinn
9162527 Leon P. Shatek
9162528 Lomax Gwathmey
9162529 Arthur L. Dalton
9162530 American Microtel, Inc.
9162531 David Del Castillo
9162532 D.M. & W.E. Walton Part.
9162533 Donald R. Toth
9162534 Frank N. Wisecup
9162566 John G. Williams, II
9162607 David Del Castillo

PORTAGE, WISCONSIN

9250015 Holly Kellogg

BECKLEY, WEST VIRGINIA

9202499 Paul J. Miller
9202502 Billy C. Ward
9202506 Keith A. Weber
9202507 John M. Walker
9202508 Michael Wayne Christie
9202509 Boyd Max Dowell
9202511 Scherer Partnership
9202512 Matthew Bonnorant
9202514 Billy C. Ward
9202515 Deanna B. King
9202516 Ervin E. Burress
9202517 Valli Ginn Battle
9202518 Erck Blackburn Partnshp.
9202521 Timothy Quigley
9202538 Paul J. Miller
9202557 Mary B. McCuen
9202558 Morris Vinckier
9202562 Fernandez Faza Ptnrs.
9202566 John Hoyt Edmisten
9202574 Williams Partnership
9202575 Zonnie Jones, Jr.
9202585 Ervin E. Burress
9202588 Charles E.Freeman
9202589 David P. Haas
9202590 Timothy Quigley
9202599 Michael Wayne Christie
9202600 John M. Walker
9202601 Fernandez Faza Partnersh.
9202603 Freddie Lee Jackson
9202604 Tony Yee
9202605 Morris Vinckier
9202606 Philip E. Atkinson
9202613 Martin Windom Partnership
9202614 David P. Haas
9202619 John Hott Edmisten
9202621 Scherer Partnership
9202626 James A. Robinson
9202628 Hodges Partnership
9202629 Mary B. McCuen
9202637 Jim W. Triplett

APPENDIX A
Untimely Petitions for Reconsideration

BECKLEY, WEST VIRGINIA

9202643 Duncan C. Lee
9202646 Hodges Partnership
9202652 D. Hope Pickett
9202653 James A. Robinson
9202656 Yahale Yadede
9202657 Deanna B. King
9202660 Matthew Bonnorant
9202703 Randolph A. Speir
9202704 Valli Ginn Battle
9202705 Tony Yee
9202706 Freddie Lee Jackson
9202707 Erck Blackburn Prtnshp.
9202711 Philip E. Atkinson
9202720 Williams Partneership
9202722 L.A. Razzetti
9202723 Yahale Yadede
9202724 Jim W. Triplett
9202727 Duncan C. Lee
9202774 Keith A. Weber
9202777 D. Hope Pickett
9202778 Arthur L. Dalton
9202779 Zonnie Jones, Jr.
9202780 Randolph A. Spier

LOGAN, WEST VIRGINIA

9203541 Craig Chartrand
9203542 David Chavis
9203543 W.M. Redding
9203544 Aage Olsen
9203545 David Joseph
9203546 Joseph W & Janie Christo
9203547 Jon T. Boehnlein
9203548 John Burkhardt
9203549 C.M. Johnson
9203550 Victor Chartrand
9203551 Sharlene A. Reese
9203552 James M. O'Connell
9203553 William R. Bone, Jr.
9203554 Walter R. Kugler
9203555 Victor Chartrand
9203556 O.M. & J.N. Anderson Ptr.
9203563 Clarence M. Kooker
9203564 Phillip Dennis Boyd
9203571 P.M. & C.M.Berry Ptrnshp.
9203572 William F. Bruce
9203573 D.C.Bowe & G.C.Bowden Pa.
9203576 D.S.& S.S. Anderson and L
9203578 R.H. Bedrossian
9203579 William J. Wagner U D T 7
9203580 Leslie Fayr Barkley
9203581 Harvey Marlowe
9203582 Max E. Kelley
9203583 Kathryn L. Buehrig
9203584 Sanford L. Mauldin
9203585 Walter R. Kugler
9203586 David Joseph
9203588 Jasper De Lasse
9203589 W.M. Redding
9203590 Robert J. Bartoletti
9203591 Ronnie Reese
9203592 James M. O'Connell
9203593 Howard B. Adams
9203594 Becky Bennett
9203596 Renee Mcamis
9203602 Annegret C. Topel
9203603 Joseph W. & Janie Christo

APPENDIX A
Untimely Petitions for Reconsideration

LOGAN, WEST VIRGINIA, continued

9203605 Donald L. Spring
9203607 Phat Peter Giang
9203608 Perry W. Jenkins
9203610 Renee Mcamis
9203611 Elsie F. Chippendale
9203613 Paul J. Demarle
9203614 Clarence M. Kooker
9203616 Phil Blanton
9203619 Larry G. Dale
920636 Kathryn L. Buehrig
9203640 Del Brock
9203642 C.M. Johnson
9203643 Aage Olsen
9203645 William R. Bone Jr.
9203660 O.M.& J.N. Anderson Ptr.
9203661 Anne L. Adamson
9203664 Walter D. Graham
9203666 Jon T. Boehnlein
9203667 Mabel M. Hiler
9203669 Jasper De Lasse
9203673 Ronnie Reese
9203676 Phillip Dennis Boyd
9203680 Leslie Fayr Barkley
9203682 Albert S. Martinez
9203684 Howard B. Adams
9203685 Billy B & Grace P Balee
9203687 Annegret C. Topel
9203688 Perry W. Jenkins
9203690 William J. Wager U D T 7
9203691 Harvey Marlowe
9203693 Henry Van Dyke, Jr.
9203696 J.C. Thames
9203700 Donald R. Toth
9203704 Paul J. Demarle
9203707 Sanford L. Mauldin
9203708 Phil Blanton
9203710 Phat Peter Giang
9203715 Donald L. Spring
9203720 Gary R. Barnes
9203722 Elsie F. Chippendale
9203723 David Chavis
9203725 Henry Van Dyke, Jr.
9203726 Iver C. Vollmer
9203727 Max E. Kelley
9203728 Winnie Reese
9203729 Donald R. Toth
9203730 J E Sudolski & L R Sucho
9203731 Gary R. Barnes
9203732 Mabel M. Hiler
9203733 American Microtel, Inc.
9203734 Becky Bennett
9203735 William E. Bruce
9203736 Bobby H. & Betty J. Bryan
9203737 Del Brock
9203738 Anne L. Adamson
9203739 Walter D. Graham
9203742 D S & S S Anderson and L
9203748 Gillingham & Schnurr Ptr.
9203749 D.C. Bowe &G.C.Bowden Pa.
9203750 Harold L. Gray
9203751 Arthur L. Dalton
9203752 Clayton Sonderegger
9203755 Larry G. Dale
9203756 Billy B. & Grace P. Balee
9203758 Andrew J. Back
9203759 Larbig Rowe Enterprises
9203760 Reynaldo D. Fernandez
9203761 Iver C. Vollmer
9203762 Scott E. Schroeder
9203764 J E Sudolski & L R Sucho
9203765 P.M. & C.M. Berry Ptrshp.
9203766 R.H. Bedrossian
9203771 American Microtel, Inc.
9203772 Harold L. Gray
9203773 Craig Chartrand
9203774 Scott E. Schroeder

APPENDIX A
Untimely Petitions for Reconsideration

LOGAN, WEST VIRGINIA, continued

9203775 Arthur L. Dalton
9203776 Clayton Sonderegger
9203777 J.C. Thames
9203778 Reynaldo D. Fernandez
9203779 Larbig Rowe Enterprises
9203780 Andrew J. Back
9203781 Albert S. Martinez
9203783 Winnie Reese
9203784 Sharlene A. Reese
9203786 John Burkhardt
9203787 Robert J. Bartoletti

PETERSBURG, WEST VIRGINIA

9160914 Data Cable, A Limited Pa.
9160915 Data Cable, A Limited Pa.